IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

JAN 26 1973

MICHAEL RODAK, JR., CLERK

ARLES COLES DIGGS, SHIRLEY ANITA CHISHOLM, WILLIAM LACY CLAY, GEORGE WASHINGTON COLLINS, JOHN CONYERS, RONALD V. DELLUMS, WALTER E. FAUNTORY, AUGUSTUS F. HAWKINS, RALPH HAROLD METCALFE, PARREN JAMES MITCHELL, ROBERT N. C. NIX, CHARLES B. RANGEL, LOUIS STOKES, as citizens and members of Congress, House of Representatives; DAVIS M'GABE, individually and on behalf of the class of all refugees from Southern Rhodesia residing in the United States who wish to return to their homeland; AMERICAN COMMITTEE ON AFRICA; COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST; EPISCOPAL CHURCHMEN FOR SOUTH AFRICA; IFCO-ACTION; SOUTHERN AFRICA COMMITTEE; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE; ZIMBABWE AFRICAN NATIONAL UNION; and THOMAS M. FRANCK, EDWARD WEISBAND, BERT LOCKWOOD, SHELLY FENCHEL, JOEL CARLSON, ROBERT GOLDSCHMIDT, ROBERT JANOSIK, NIGEL RODLEY, DIANE FLAHERTY, ANTOINE VAN DONGER, as concerned individuals; GORE VIDAL, individually and on behalf of the class of all authors whose books have been banned in Southern Rhodesia,

Petitioners,

v.

EORGE P. SCHULZ, as Secretary of the Treasury of the United States, Department of the Treasury; STANLEY L. SOMMERFIELD, as Acting Director of the Office of Foreign Assets; MYLES J. AMBROSE, as Commissioner of the Bureau of Customs, Department of the Treasury; and UNION CARBIDE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1037

CHARLES COLES DIGGS, SHIRLEY ANITA CHISHOLM, WILLIAM LACY CLAY, GEORGE WASHINGTON COLLINS, JOHN CONYERS, RONALD V. DELLUMS, WALTER E. FAUNTORY, AUGUSTUS F. HAWKINS, RALPH HAROLD METCALFE, PARREN JAMES MITCHELL, ROBERT N. C. NIX, CHARLES B. RANGEL, LOUIS STOKES, as citizens and members of Congress, House of Representatives; DAVIS M'GABE, individually and on behalf of the class of all refugees from Southern Rhodesia residing in the United States who wish to return to their homeland; AMERICAN COMMITTEE ON AFRICA; COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST; EPISCOPAL CHURCHMEN FOR SOUTH AFRICA; IFCO-ACTION; SOUTHERN AFRICA COMMITTEE; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE; ZIMBABWE AFRICAN NATIONAL UNION; and THOMAS M. FRANCK, EDWARD WEISBAND, BERT LOCKWOOD, SHELLY FENCHEL, JOEL CARLSON, ROBERT GOLDSCHMIDT, ROBERT JANOSIK, NIGEL RODLEY, DIANE FLAHERTY, ANTOINE VAN DONGER, as concerned individuals; GORE VIDAL, individually and on behalf of the class of all authors whose books have been banned in Southern Rhodesia,

Petitioners,

v.

GEORGE P. SCHULZ, as Secretary of the Treasury of the United States, Department of the Treasury; STANLEY L. SOMMERFIELD, as Acting Director of the Office of Foreign Assets; MYLES J. AMBROSE, as Commissioner of the Bureau of Customs, Department of the Treasury; and UNION CARBIDE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioners, Charles Coles Diggs, Shirley Anita Chisholm, William Lacy Clay, George Washington Collins, John Conyers, Ronald V. Dellums, Walter E. Fauntroy, Augustus F. Hawkins, Ralph Harold Metcalfe, Parren James Mitchell, Robert N. C. Nix, Charles B. Rangel, and Louis Stokes, as citizens and members of Congress, House of Representatives; Davis M'Gabe, individually and on behalf of the class of all refugees from Southern Rhodesia residing in the United States who wish to return to their homeland; American Committee on Africa; Council for Christian Social Action of the United Church of Christ; Episcopal Churchmen for South Africa; IFCO-Action; Southern Africa Committee; Southern Christian Leadership Conference; Zimbabwe African National Union; and Thomas M. Franck, Edward Weisband, Bert Lockwood, Shelly Fenchel, Joel Carlson, Robert Goldschmidt, Robert Janosik, Nigel Rodley, Diane Flaherty, and Antoine Van Donger, as concerned individuals; Gore Vidal, individually and on behalf of the class of all authors whose books have been banned in Southern Rhodesia, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit sustaining the judgment of the United States District Court for the District of Columbia dismissing the Complaint herein.

Opinions Below

The opinions of the Court of Appeals and of the District Court have not been reported. Copies of those opinions are appended hereto as Exhibits A and B.

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Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was rendered on October 31, 1972. This Petition is filed within the period fixed by 28 U.S.C., Sec. 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

Questions Presented for Review

1. Granted that the Congress has the power, by clearly expressed legislation, to violate a treaty obligation of the United States, does the President have the power so to do in the absence of a clear legislative directive requiring that he do so?

2. Where a statute of Congress does not (a) refer to a treaty obligation or the abrogation thereof, (b) does not in terms require violation of a treaty, (c) does not require executive action inconsistent with any treaty, and (d) plainly leaves the executive with an opportunity to pursue a course of conduct which would not be violative of a treaty obligation, can it be said that the legislature has exercised a power to abrogate the treaty merely because some of its sponsors wished that would be the result of the legislation?

3. Does the relationship between the United States and the United Nations alter the normal rules as to the reservation of the sovereign right to abrogate or violate treaties; more specifically, in view of the veto power which the United States has within the United Nations, does the United States retain additionally the power to abrogate or violate its obligations to the United Nations with

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respect to specific resolutions of the Security Council, including those for which it voted within the chambers of the United Nations?

4. Assuming the answer to question 3 is in the affirmative, what branch of the government as a matter of domestic Constitutional law of the United States has the power to breach obligations of the United States to the United Nations and what methods or procedures are required to be employed in effecting such a breach? More specifically, the executive branch of the government having voted within the councils of the United Nations for a mandatory resolution, does the Congress retain the power to override such a vote; if so, what degree of specificity and clarity of expression by the Congress is required; and may it be said that legislation which does not mandate a breach of treaty obligations to the United Nations nevertheless authorizes the President by executive action to effect such a breach?

Statutes, Resolutions, Regulations and Executive Orders Involved

(The documents here referred to are set out in full in the Appendix hereto.)

1. Chapter V, Article 25 and Chapter VII, Article 41 of the Charter of the United Nations, signed by the United States at the U.N. Conference on International Organization, at San Francisco, California, on June 26, 1945, 59 Stat. 1031 (1a).

2. Resolutions of the U.N. Security Council:

   No. 232, December 16, 1966 (2a);

   No. 253, May 29, 1968 (6a); and

   No. 314, February 28, 1972 (14a).

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3. United Nations Participation Act, 22 U.S.C., Sec. 287(c), 59 Stat. 620 (16a).

4. Executive Orders:

   No. 11322, January 5, 1967 (17a); and
   No. 11419, July 29, 1968 (21a).

5. Byrd Amendment, constituting Sec. 503 of the Military Procurement Act of 1971, effecting an amendment to the Strategic and Critical Materials Procurement Act, 50 U.S.C., Sec. 98-98(h), 85 Stat. 427 (26a).

6. General License issued by the Office of Foreign Assets Control, 37 F. Reg. 1108 (27a).

Statement of the Case

This is an action brought by a number of plaintiffs seeking injunctive and declaratory relief to prevent the importation from Southern Rhodesia of metallurgical chromite and other materials. The substantive basis of the suit as set out in the amended complaint and the amendment thereto is essentially as follows:

On August 8, 1945, the United States ratified its adherence to the Charter of the United Nations and became a permanent member of the Security Council. 59 Stat. 1031 (1945). By the United Nations Participation Act (22 U.S.C. §287), the United States articulated certain domestic procedures for the means of executive implementation and enforcement of the obligations which it had previously assumed under the United Nations Charter.

The U.N. Charter provides in Chapter VII, *Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggresion,* Article 41, as follows:

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> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations."

Chapter V, *The Security Council,* provides in Article 25 as follows:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

As outlined in the affidavit of the plaintiff Carlson filed in the court below, Southern Rhodesia is an area where the population is roughly 95% Black. In 1965, the 5% of whites illegally seized power from Great Britain and announced their intention to maintain minority rule for the foreseeable future. The United Kingdom, not wishing to use force of arms, called upon the international community to help bring the illegal government to its knees and accordingly, pursuant to Chapter VII aforesaid, on December 16, 1966, the United Nations Security Council adopted Resolution 232, which provided the following:

> "The Security Council,
>
> Reaffirming its resolutions 216 (1965) of 12 November 1965, 217 (1965) of 20 November 1965 and 221 (1966) of 9 April, 1966, and in particular its appeal to all States to do their utmost to break off economic relations with Southern Rhodesia,

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Deeply concerned that the Council's efforts so far and the measures taken by the administering Power have failed to bring the rebellion in Southern Rhodesia to an end,

• • •

Acting in accordance with Articles 39 and 41 of the United Nations Charter,

• • •

Decides that all States Members of the United Nations shall prevent:

The import into their territories of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products and hides, skins and leather originating in Southern Rhodesia and exported therefrom after the date of the present resolution;

Any activities by their nationals or in their territories which promote or are calculated to promote the export of these commodities from Southern Rhodesia and any dealings by their nationals or in their territories in any of these commodities originating in Southern Rhodesia and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Southern Rhodesia for the purposes of such activities or dealings; • • •"

The matter of Southern Rhodesia came before the Security Council on subsequent occasions and the resolve of the Security Council to impose mandatory economic sanctions for the purpose of defeating the illegal regime of Southern Rhodesia has been repeated and expanded. Under date of May 29, 1968, Resolution 253 was adopted, reading as follows:

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"The Security Council,

Recalling and reaffirming its resolutions 216 (1965) of 12 November 1965, 217 (1965) of 20 November 1965, 221 (1966) of 9 April 1966, and 232 (1966) of 16 December 1966,

• • •

Condemning the recent inhuman executions carried out by the illegal regime in Southern Rhodesia which have flagrantly affronted the conscience of mankind and have been universally condemned,

• • •

Recognizing the legitimacy of the struggle of the people of Southern Rhodesia to secure the enjoyment of their rights as set forth in the Charter of the United Nations and in conformity with the objectives of General Assembly resolution 1514 (XV) of 14 December 1960,

• • •

Acting under Chapter VII of the Charter of the United Nations,

1. Condemns all measures of political repression, including arrests, detentions, trials and executions which violate fundamental freedoms and rights of the people of Southern Rhodesia, and call upon the Government of the United Kingdom to take all possible measures to put an end to such actions;

• • •

3. Decides that, in furtherance of the objective of ending the rebellion, all States Members of the United Nations shall prevent:

(a) The import into their territories of all commodities and products originating in Southern Rhodesia and exported therefrom after the date of this

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resolution (whether or not the commodities or products are for consumption or processing in their territories, whether or not they are imported in bond and whether or not any special legal status with respect to the import of goods is enjoyed by the port or other place where they are imported or stored);

(b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export of any commodities or products from Southern Rhodesia; and any dealings by their nationals or in their territories in any commodities or products originating in Southern Rhodesia and exported therefrom after the date of this resolution, including in particular any transfer of funds to Southern Rhodesia for the purposes of such activities or dealings; * * *"

The 1966 Resolution refers to an embargo of specified products, the 1968 Resolution imposes an embargo on *all* products.

In the more than a quarter century that the United Nations has been in operation, the imposition of mandatory economic sanctions against Southern Rhodesia is the *sole* instance where the U.N. has acted pursuant to Chapter VII, Article 41. This stark fact poignantly illustrates the gravity with which the member states view the situation in Southern Rhodesia.

The Government of the United States as a permanent member of the Security Council had the power, if it chose to, to veto any of the foregoing resolutions. In no case did the United States exercise its veto power and in fact these resolutions were adopted with the affirmative vote of the United States.

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Pursuant to the U.N. Charter, the United Nations Participation Act, and Security Council Resolution 232, the President of the United States issued Executive Orders to trigger the domestic criminal sanctions (provided for in 22 U.S.C. §287(c)(b)) for violation of the embargo on shipments from Southern Rhodesia, and directed the Secretaries of State, Treasury and Commerce to take steps to enforce the embargo. See Executive Orders 11322 of January 5, 1967 and 11419 of July 29, 1968, both set forth in the appendix hereto (17a).

Thus, since the adoption of the Security Council Resolution of December 16, 1966, and until the acts hereinafter complained of, there had been an embargo of commercial traffic between the United States and Southern Rhodesia.

On November 17, 1971, the President of the United States signed into law the Military Procurement Act of 1971, Sec. 503 of which (hereinafter and commonly known as the Byrd Amendment) constituted an amendment to the Strategic and Critical Materials Stock Piling Act (50 U.S.C. §98-98(h), by adding the following:

> "Section 10. Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. §1202) for so long as the importation into the United States of material of that kind which is the product of such Communist-domi-

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nated countries or areas is not prohibited by any provision of law."

The law was adopted over the objections of the administration when it was originally proposed as an amendment to the U.N. Participation Act.* The sponsors of the legislation effectively forced Presidential approval by tacking the bill on as a rider to the military appropriations act.

On January 25, 1972, purportedly acting pursuant to the Byrd Amendment, the Office of Foreign Assets Control (OFAC) issued a General License (37 Fed. Reg. 1108) authorizing the importation of a wide range of materials from Southern Rhodesia, including 72 items which had been listed by the Office of Emergency Preparedness (OEP) in its reports to Congress of stock piles. The

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* David D. Newsom, Assistant Secretary of State for African Affairs, testifying for the administration on July 7 and 8, 1971, in hearings before the Committee on Foreign Relations, U. S. Senate, 92nd Congress, 1st Session, on S. 1404 to Amend the United Nations Participation Act of 1945, said:

> "This proposal is contrary to U. S. policy interests. It would while providing relief with regard to one commodity—a commodity for which, I might add, relief can be justified not on the basis of national security interests but on the basis of relative price considerations—call into serious question our will to fulfill our international obligations.
>
> "We are not unmindful of the national interest which concerns those who propose this legislation. Were the chrome situation indeed critical we, too, would seek measures of relief. We do not now, however, consider it such; for us the overriding considerations are our international obligations and our desire to do nothing which would undermine movement on an acceptable solution to the Rhodesian problem." (p. 15)

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said items included, among others, metallurgical chromite as to which the reports to Congress showed a surplus. The list also included feathers and down, caster oil, and sperm oil. This action by the OFAC was taken despite the fact that the Executive Orders implementing the Security Council Resolutions have never been rescinded.*

The Strategic and Critical Materials Stock Piling Act was originally derived from legislation enacted in 1939 and is now administered by the OEP. Under that statute, stockpiles are maintained of designated materials and regular reports are made to Congress. In its report as of June 30, 1971, the OEP listed 72 items, as appears in the table reproduced in the appendix herein (33a). The total amount stockpiled was far in excess of stated stockpiling objectives, and in respect to metallurgical chromite, the report showed a stockpile objective of 3,086,800 short dry tons as against an inventory of 5,331,613 short dry tons, or an excess of 2,244,813 short dry tons.

In 1971, the OEP presented to Congress a bill (S. 773, 92nd Cong., 1st Sess., 1971) which would authorize disposal of 1,313,600 short dry tons of excess metallurgical chromite from the stockpile.

Following the issuance of the General License aforesaid, two shipments of metallurgical chromite from Southern Rhodesia to the United States were undertaken, one by Union Carbide to the extent of 59,362,265 lbs. and the other by Foote Mineral to the extent of 55,803,392 lbs. The arrival of these shipments and the possibility of further shipments prompted the within litigation against both corporations and the government officials involved with licensing and permitting the importations.

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* Thus the United States recognizes the Security Council's embargo except as to the 72 items listed by the OEP.

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Petitioners alleged, and respondents did not deny, that the chromite which has been imported will be used for the manufacture of stainless steel which will go exclusively to non-defense purposes, more specifically, for the fabrication of kitchenware.

Petitioners sought seizure of the two shipments of metallurgical chromite and other materials which had been imported and also an injunction to prevent further shipments into the United States from Southern Rhodesia.

Petitioners asserted that the Byrd Amendment could not, and in any event did not, vitiate the commitment of the United States undertaken in the Charter of the United Nations. Accordingly, petitioners contended that the General License issued by the Office of Foreign Assets Control (upon which the shipments of chrome were permitted) was void.

Proceedings Below

Petitioners sought temporary relief, which was denied. Thereafter, cross-motions for summary judgment were made and respondents made a motion to dismiss for lack of standing. The trial court rendered an opinion on June 19, 1972 and entered judgment on June 26 dismissing the complaint for lack of standing.*

The Court of Appeals, however, found that some of the petitioners did establish adequate standing and proceeded to the merits. It held in effect that:

a) Congress has the power to set treaty obligations "at naught" (53a):

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* Earlier the proceedings had been dismissed against Foote Mineral for lack of personal jurisdiction (see note 4, opinion of District Court 37a).

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b) Even though the Byrd Amendment permits a course of conduct by the executive which would not constitute a violation of a treaty obligation, the court would not require the President to choose such a course (54a); and

c) Even if the legislation did not on its face require the President to breach a treaty obligation, the "purpose" of the Byrd Amendment was "to detach this country from the U.N. boycott of Southern Rhodesia in blatant disregard of the treaty undertakings" (*ibid.*), and since that was clearly the intent of the Congress, the "so-called options given to the President are, in reality, not options at all. In any event, they are in neither case alternatives which are appropriately to be forced upon him by a court." (55a)

It should be observed that the executive branch of the government at all times opposed adoption of the Byrd Amendment (*supra*, fn. p. 11) and sought its repeal after it was adopted (see letter of Assistant Secretary of State Irwin (30a)). Thus, the suggestion by the lower court that the within proceeding touched upon the political question doctrine because it involved an effort to achieve judicial compulsion of the executive to take a foreign affairs position contrary to its wishes is a confusion of the issues. This is rather a case where the executive felt compelled against its stated wishes to pursue a course of conduct because it considered itself bound by legislation. Our disagreement with the executive branch of the government is not on foreign policy but upon its judgment that the legislation required a given result and that the executive was compelled to respond in a particular fashion. Thus, the issue is clearly a question of constitutional law and in no way approaches a political question.

Events since the enactment of the Byrd Amendment confirm two facts: (a) that the executive continues to act

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against its stated foreign policy objectives, and (b) that the matter at issue has seriously affected relations between the United States and other countries.

(a) On or about May 20, 1972, the administration urged repeal of the Byrd Amendment and the State Department addressed a communication to Senator McGee to that effect (the full text of the communication is reprinted at 30a). The administration emphasized the seriousness of this matter as affecting relations between the United States and the international community, as well as the conviction of the administration that neither "economic nor national security considerations affecting chrome are sufficiently compelling to compensate for the adverse foreign policy consequences of the legislation now in effect" (31a):

(b) On February 28, 1972, the Security Council, with the United States abstaining, adopted Resolution 314 (14a), expressing its grave concern "that certain States have not complied with the provisions of resolution 253 (1968), contrary to their obligations under Article 25 of the Charter of the United Nations, and then proceeded to declare that

> "any legislation passed or act taken, by any State with a view to permitting, directly or indirectly, the importation from Southern Rhodesia of any commodity falling within the scope of the obligations imposed by resolution 253 (1968), including chrome ore, would undermine sanctions and would be contrary to the obligations of the States."

The United Nations has on several subsequent occasions, both in the Security Council and finally in the General Assembly, sharply criticized the action of the United States.

On July 28, 1972, by Resolution 318, the United States again abstaining, the Security Council demanded "that all

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Member States should scrupulously carry out their obligations to implement fully Security Council resolution 253 (1968), 277 (1970), and 314 (1972)" and condemned "all acts violating the provisions of Security Council resolutions 253 (1968), 277 (1970) and 314 (1972)."

Security Council Resolution 320, passed on September 29, 1972 with 13 in favor, none against, and the United States again abstaining, was specifically directed at the United States. The Resolution states that the Council is "deeply concerned by the report of the United States that it has authorized the importation of chrome ore and other minerals from Southern Rhodesia" and it "Urges the United States to cooperate fully with the United Nations in the effective implementation of sanctions; * * *"

The General Assembly adopted a Resolution on December 11, 1972 (FA Res. 2946) by a vote of 93 in favor, eight against (including the United States), and 23 abstentions, which strongly condemned the United States. The Resolution includes the following:

> *"The General Assembly*
>
> *Gravely concerned* that, despite the appeals addressed to the Government of the United States of America in General Assembly resolution 2765 (XXVI) of 16 November 1971, that Government continues to permit the importation of chrome and nickel into the United States from Southern Rhodesia, in violation of the relevant provisions of Security Council resolutions 253 (1968) of 29 May 1968, 277 (1970) of 18 March 1970, 288 (1970) of 17 November 1970 and 314 (1972) of 28 February 1972,
>
> * * *

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> *Condemns* the continued importation by the Government of the United States of America of chrome and nickel from Zimbabwe in open contravention of the provisions of Security Council resolutions 253 (1968), 277 (1970), 288 (1970) and 314 (1972) and contrary to the specific obligations assumed by that Government under Article 25 of the Charter, and calls upon the United States Government to desist forthwith from further violations of the sanctions and to observe faithfully and without exception the provisions of the above-mentioned resolutions; * * *"

The problem of enforcement of sanctions against Southern Rhodesia has not gone away; it remains a very live one within the United Nations. The U.N. has created a Committee Established in Pursuance of Security Council Resolution 253 (1968), commonly known as the "Committee of 24", which meets not less than twice a month, and submits reports to the U.N. with respect to the compliance of various nations with the Security Council Resolutions on Southern Rhodesia. Its latest report dated December 22, 1972 (U.N. Doc. S/10852), again calls attention to violations by the United States of the Resolutions.

Reasons for Granting the Writ

The situation presented by this case is the first in the history of the relations between the United States and the United Nations where this nation is acting, in the words of the Court of Appeals, "in blatant disregard of our treaty undertakings" (54a) to that body. The most far-reaching international commitment ever undertaken by this nation is undermined—and yet the questions of what branch of the government has the power and responsibility to effect such a result and the procedures by which

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such a result may be brought about are obscure and unsettled.

The questions presented by this petition are on their face important questions of constitutional law which have not been but should be settled by this Court; they touch upon questions of domestic constitutional law affecting the relationship between this nation and the United Nations.

It is particularly appropriate that the Court deal with the issues presented in this case because, contrary to what was inferred by the Court of Appeals, the case does not involve any effort to effect a course in foreign relations contrary to the policy of the executive. Thus, the case in no way presents to the Court the situation where it would be intervening to impose foreign policy objectives contrary to the stated program of the executive branch of the government, to which the execution of foreign policy is entrusted. Rather, the issues as presented for determination involve questions of the allocation of power and the method of exercising power to abrogate or breach obligations of the United States to the United Nations, questions which plainly need clarification.

I

The decision below, contrary to the Constitution, gives the President power to breach a treaty obligation of the United States.

It is familiar doctrine, as stated by the Court of Appeals, that Congress has "the constitutional power . . . to set treaty obligations at naught" (53a).

But Congress did not do that in this case. The Byrd Amendment plainly does not denounce or break a treaty; it does not even mention that it is dealing with treaty

obligations; and while it may well be that Congress can effect an abrogation of a treaty by the enactment of legislation plainly inconsistent with it, it has not done so in this case.

It is conceded by all parties herein and recognized by the Court of Appeals that the President did have options left to him under the legislation which would not have involved a breach of treaty.* Thus, the breach of the

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*The alternatives available to the President, only two of which were referred to by the Court of Appeals, included at least the following:

1) Termination of importation of chrome from Communist countries;

2) Removal of chrome from the list of strategic and critical materials;

3) A stringent reading of the statute which permitted interpretations to avoid the breach of the embargo (a series of these readings was suggested in the original Complaint);

4) An application pursuant to Article 50 of the U.N. Charter the Security Council, for a consideration of 'special economic problems arising from the carrying out of [preventive or enforcement measures under Articles 48 and 49] . . . with regard to a solution of these problems.' Zambia obviously had certain problems as a result of its unique geographical location and economic dependence on Southern Rhodesia, as a result of which Par. 15 of the 1968 Resolution (12a) makes special note of a call for assistance from other nations.

The failure of the administration to adopt any of these options may have been the result of a view that they were unattractive, or that it ought to comply with what it believed to be the intent of the sponsors of the legislation, even though the legislation does not articulate that intent, or for some other unstated reason. Whatever may have been the considerations which determined the administration's course, the basic constitutional issues here presented are unaffected.

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treaty obligation in this case was a choice made by the President and not dictated by Congress. Accordingly, a question presented by this case is whether there is Presidential power to violate a treaty, absent a clear legislative mandate.

Surprisingly, this question has never been squarely dealt with by this Court. In the one case which might have involved the question, the Court concluded that "the question as to the authority of the executive in the absence of Congressional action, or action by the treaty-making power, to denounce a treaty of the United States is not here involved." *Van der Weyde* v. *Ocean Transport Co.*, 297 U.S. 114, 117 (1936).

Though the Constitution is specific as to the treaty-making power, it is silent on the treaty-terminating power.

This Court, as stated by the Court of Appeals, has held that Congress, by clearly defined legislation, has the power to override a treaty.

Mr. Justice (then Judge) Cardozo, sitting on the Court of Appeals of New York, in his opinion in *Techt* v. *Hughes,* stated that there were two procedures for denunciation of a treaty: "President and Senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts." 229 N.Y. 222, 128 N.E. 2d 485 (1920). This formulation was quoted with approval by the Court in *Clark* v. *Allen,* 331 U.S. 503 at 509 (1947).

The foregoing was foretold by Mr. Justice Story in *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 75 (1921):

> "The obligations of the treaty could not be changed or varied, but by the same formalities with which

> they were introduced; or, at least, by some act of as high an import, and of as unequivocal an authority."

The executive branch of the government of course is vested with major responsibility in the field of foreign relations but the only references in the Constitution to Presidential power in respect to treaties are that:

(a) He may make treaties, by and with the advice and consent of the Senate, provided "two-thirds of the Senators present concur" (Art. II, Sec. 2, Clause 2), and

(b) He is required to "take care that the laws be faithfully executed" (Art. II, Sec. 2, Clause 3), and of course treaties are part of "the supreme law of the land" (Art. VI, Clause 2).

Since the Constitution puts the Presidential responsibility to enforce a treaty on the same level as that of a law, it would not appear that the President has any more power to abrogate or breach a treaty than he has to repeal a law.

It is understandable that the Court would recognize a procedure of abrogation by the President and a two-thirds vote of the Senate, acting together, since that is nothing but the converse of making a treaty. Nowhere, however, would there appear to be any authority for executive power alone in this respect.

Repeatedly the State Department has taken the position that the President does not have the power to modify or abrogate a treaty. A clear example can be found in a State Department reply to France upon its request that the United States recognize rights of France in Morocco not included in the then effective United States treaty with Morocco. "The Department of State took the

position that . . . 'as the adherence of this Government would seem to imply the modification of certain of its existing treaty rights, the consent to such adherence on the part of the United States involves the conjoint action of the treaty-making powers of this Government and our acceptance of the agreement in question could therefore be made only by and with the advice and consent of the Senate." 5 Hackworth, *Digest of International Law,* 333 (1940).

This precedent is repeated in 1920 when the State Department again confirmed that a 1920 treaty in question "could not be modified save by agreement of all the Powers signatory thereto: and such modification in the case of the United States would not be effective without the approval of the Senate." (*Id.* at 337.)

This formula for treaty modification reappears in a memorandum of the Solicitor for the Department of State in 1931, where it is stated:

> "The President is, of course, without authority, except by and with the advice and consent of the Senate, to modify a treaty provision." (*Id.* at 340)

So far as we know, this is the first case where it has even been contended that there exists Presidential power to violate a treaty absent a clear legislative mandate to that effect.*

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* There are occasional references in the authorities to a Presidential power to "terminate" treaties upon the President's own initiative (5 Hackworth at 319), or to a Presidential power to "denounce" treaties (*id.* at 332). Close analysis reveals, however, that any confusion resulting from these statements is nothing but

(Footnote continued on following page)

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Thus, the instant case presents in sharp focus an issue of fundamental importance relating to the allocation of powers within our system which can and should be determined by this Court.

(Footnote continued from preceding page)

a matter of semantics flowing from imprecise use of terminology. The "termination" or "renunciation" referred to has to do with the President (consistent with recognized principles of international practice) noting the termination of a treaty upon its terms, or as directed by Congress, or because of a breach by the other state. This Court in the *Van der Weyde* case, *supra,* was plainly aware of the distinction. The *Restatement of Foreign Relations Law of the United States* (1965) in Sec. 163 makes clear the limited nature of Presidential power:

> "(1) Under the law of the United States, the President or a person acting under his authority, has, with respect to an international agreement to which the United States is a party, the authority to
>
> (a) take the action necessary to accomplish under the rule stated in § 155 the suspension or termination of the agreement in accordance with provisions included in it for the purpose,
>
> (b) make the determination of conditions that establish that the agreement may be suspended or terminated under the rule stated in § 158 because of its violation by another party or that it is terminated under the rule stated in § 159 as regards a party that has ceased to exist."

We know of no precedent for a Presidential power to *violate* a treaty such as here.

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II

The decision below is contrary to the longstanding rule that, though Congress may abrogate a treaty, it must do so in clear and precise language and that a statute should, if possible, be construed in a manner consistent with treaty obligations.

It is familiar doctrine that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress," *Pigeon River Co.* v. *Cox Co.*, 291 U.S. 138 (1934), quoted most recently by this Court in *Menominee Tribe* v. *United States*, 391 U. S. 404, 413 (1968).

But the Court has gone even further. Mr. Chief Justice Marshall laid down the rule that "an act of Congress ought never be construed to violate the law of nations if any possible other construction remains . . ." *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118, reiterated in *Lauritzen* v. *Larsen*, 345 U. S. 571, 578 (1953). See also, *United States* v. *Lee Yen Tai*, 185 U. S. 213 (1902), where the Court said not only that an intention to supercede a treaty must not be lightly assumed but "must appear clearly and distinctly from the words used in the statute." 185 U. S. at 221. See substantially the same language in *Cook* v. *United States*, 288 U. S. 102, 120 (1933).

The rule of statutory construction requiring clarity and incisiveness of Congressional determination to abrogate a treaty was designed to assure the integrity of this country's relationships in the international community.

Abrogation of a treaty is an extremely serious step and one which requires the most deliberate and careful articulation by whichever branches of our government are deemed to have the power so to do. Where the Consti-

tution deals with ratification of a treaty, it requires a two-thirds vote of the Senate. While abrogation of a treaty may be effected by the normal legislative process of the concurrence of both houses of Congress and the signature of the President, the clarity of the determination of Congress is an essential ingredient of the process.

The Court of Appeals, while recognizing the validity of the rule of law—while even recognizing that the legislation before it did not compel the President to abrogate treaty obligations—was nevertheless prepared to approach the question in terms of a search for legislative intention which went behind the language or the requirements of the statute. Thus, the Court of Appeals relied upon an assumption "that no member of Congress voting on the measure was under any doubt about what was involved" (Exhibit B, p. 55a) and that the Byrd Amendment was "presented to the Congress" as "a measure which would make—and was intended to make—the United States a certain treaty violator" (*ibid.*).

Whether or not this is a fair reading of the legislative intent of some of the proponents of the Amendment,* it is exteremely clear that the managers of the Amendment were not prepared to put the legislation before Congress

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* The *supporters* of the legislation were careful to point out that the legislation did not necessarily require the President to break the embargo in its entirety. For example, Senator Allen stated:

> "The section under consideration does not require the United States to scuttle the United Nations embargo against all trade with Rhodesia. I wish that it did. Instead the section deals only with importation of strategic materials which we freely purchase from Communist nations." (117 Cong. Rec., S 15590)

in terms of a mandatory obligation of the President to break the U.N. embargo. The issue in respect to the adoption of this law was closely contested and, indeed, at one time the majority in the United States Senate voted against it. (See vote on the Fulbright Amendment to the Byrd Amendment, 117 Cong. Rec., S 15594.)

Plainly, the sponsors of this legislation were not prepared to present their colleagues with a statute which would have *mandated* a breach of treaty obligations to the United Nations.

But it is the precise purpose of the rule of law which requires clarity of expression in this field that, if Congress presumes to exercise its power to break treaty obligations of the United States, it should assume the responsibility of saying so, and if it does not, then the Court should not supply the missing clarity.

As this Court said in *Chew Heong* v. *United States*, 112 U. S. 536, 539 (1884):

> "[T]he court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another coutry. 'There would no longer be any security,' says Vattel, 'no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises.' Vattel, Book 2, ch. 12. And as sovereign nations, acknowledging no superior, cannot be compelled to accept any interpretation, however just and reasonable, 'the faith of treaties constitutes in this respect all the security of contracting powers.' *Id.* ch. 17. 'Treaties of every kind,' says Kent, 'are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and

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> are to be kept in the most scrupulous good faith.' 1 Kent Com. 174. * * * Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the Court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations should be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted."

The decision of the Court of Appeals, by choosing to find a legislative intent from the objectives of the sponsors of the legislation, relieves the Congress of the necessity for showing responsibility in this field.

The Circuit Court said that this statute was designed to put the United States "in blatant disregard of our treaty undertakings." Not a single sponsor of this legislation was prepared to say that. In fact, by innuendo, indirection, and circumlocution they tried to infer exactly the contrary in their explanations.* And the language of the Amendment itself is a model of tortured confusion, there

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* See, for example, Senator Byrd's statement, ". . . I want to point out that the proposed legislation . . . does not change in any way the charter of the United Nations."

Senator Byrd's erroneous reading of U. S. treaty obligations under the U.N. Charter is effectively dealt with in Note, 58 Va. L. Rev. 511 (1972).

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being a vast gulf between the language of the statute and what is offered as so-called proof of legislative intent.

It is not an accident that the language of the Amendment makes no mention of Rhodesia, chromium, the United Nations, the embargo, treaty obligations, or any of the components which the Amendment was supposedly designed to deal with. The Amendment is cast in the language of Cold War trading policies and its entire provisions are structured in terms of Communist and non-Communist countries and Presidential options. The extraordinary silence of the statute about the United Nations was doubtless the result of a deliberate effort by the managers of the bill not to raise too many questions in the minds of their confrères who would be asked to vote for it.

For the very reason that the sponsors of the Byrd Amendment were obscure in their expressions and their language, for that reason should this Court insist upon the rule of construction that goes back to the days of Chief Justice Marshall. Only in that way can the nation be sure that when the Congress takes the extraordinary step of dealing with treaty obligations of the United States it will act with the deliberateness and responsibility that such a step requires.

III

The decision below fails to recognize the impact of this Nation's commitment to the United Nations as affecting treaty obligations of this nation to that body.

Before the creation of the United Nations, this country, as an expression of its own sovereignty, asserted its power to renounce treaty obligations. Indeed, every nation in the world had asserted such power. All that we have dis-

cussed above assumes the continued existence of the power to renounce ordinary treaty obligations; we have dealt above only with questions as to which branches of the government may exercise that power and the manner in which it may be exercised. But these questions must be viewed anew in the light of the commitment of the United States to the United Nations.

The U.N. Charter is in some limited* respects an attempt to overcome the unrestricted power of member states to ignore their obligations. In this country, fear of limiting our sovereignty by adherence to an international body was a powerful argument against our joining the League of Nations. At the conclusion of World War II, the nation considered that it should exercise world responsibilities, having been drawn into two world wars. But then the United States and the other great powers insisted that the U.N. Charter provide for them a "veto power" so that they would not be bound by resolutions of which they did not approve.

The question then is, what are the implications of the commitment of the United States when it has *not* exercised its veto power?

When this nation agreed to this international constitutional document, it clearly understood that the commitment entailed "some limitation on our freedom of action." Thus, the report of the U. S. Department of State on the results of the San Francisco Conference said:

> "This will represent a notable change in our foreign policy and in our military policy. But if it means

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* It should be noted that Article 41 of the Charter provides only for mandatory economic sanctions; it makes no provision for mandatory military sanctions.

> a far-reaching commitment, entailing expense and some limitation on our freedom of action, it must be weighed against what it is designed to prevent —the appalling cost in men and material wealth of another war. Nor can we overlook the fact that other states, not so powerful as we, will assume relatively heavy obligations without retaining the large measure of control which the United States will enjoy as one of the permanent members of the Security Council (the veto power)." Publication No. 2349, p. 88.

Having indicated that there was some limitation placed on our freedom of action, the State Department went on to assert with respect to Article 39: "If any single provision of the Charter has more substance than the others, it is surely this one sentence in which are concentrated the most important powers of the Security Council." (*Id.* at 90-91).

Article 39 provides:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

It becomes eminently clear that the U.N. Charter was not intended as, and is not, simply a treaty. It is that, but it is much more. It is a system and an organization for the maintenance of world peace. It is a system within which the government of the United States has made all necessary reservations for the protection of its own sovereignty, to wit, its power to veto any substantive res-

olution before the Security Council. This extraordinary status is recognized in the Charter itself in Article 103.*

There remains the question with respect to resolutions adopted under Articles 25 and 41, does this nation ever have the power to withdraw from its commitment? Arguably, upon failure to exercise the veto power, the United States would have surrendered its free-wheeling right to abrogate its commitment to the U.N. without even discussing it with the Security Council or proceeding under Article 50 to seek an exception.** That, after all, is what we expected of every other nation which joined that body and which was not one of the major powers which retained the veto power. But assuming that in some fashion this nation nevertheles reserved its right to abrogate its obligations, it becomes even the more necessary that this Court clarify who within this government has that power and how it should be exercised. The decision of the Court of Appeals, while referring to the United States as being in "blatant disregard of its treaty obligations", would leave in a wholly confused state critical questions as to the internal operations of our government in this area.

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* Article 103 provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

** The reluctance of the United States to proceed under this provision may well have been predicated upon the fact that the concern of this violation is stainless steel kitchenware!

CONCLUSION

Traditionally, the courts have diligently scrutinized these Congressional enactments whose implementation by the executive have raised conflicts with the enforcement of prior treaties. These judicial inquiries have been mandated by the Constitutional pronouncement that treaties are the supreme law of the land, and infused with a vital realization that treaties help form the necessary bond of trust and intercourse between nations. Never before has this Court been confronted with a situation where a high judicial body has pronounced with such forcefulness that this nation has acted "in blatant disregard of our treaty obligations." In the face of that, this Court cannot permit the continuation of such obvious fuzziness as to who within our government is responsible therefor and how the sovereign rights of our nation are to be exercised. The relations between our country and the U.N. are too important to permit that lack of clarity to continue.

The petition for a writ of certiorari should be granted.

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** Counsel for Petitioners which to acknowledge the invaluable assistance they have received from Burt Lockwood of the Center for International Studies at New York University and from Anne Margulies.

APPENDIX

United Nations Charter

(Signed by the United States on June 26, 1945, at the U.N. Conference on International Organization, at San Francisco, California)

Chapter V, Article 25:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Chapter VII, Article 41:

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions and it may call upon Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations."

Resolution 232 (1966) Adopted by the Security Council on 16 December 1966

The Security Council,

Reaffirming its resolutions 216 (1965) of 12 November 1965, 217 (1965) of 20 November 1965 and 221 (1966) 19 April 1966, and in particular its appeal to all States to do their utmost to break off economic relations with Southern Rhodesia.

Deeply concerned that the Council's efforts so far and the measures taken by the administering Power have failed to bring the rebellion in Southern Rhodesia to an end,

Reaffirming that, to the extent not superseded in the present resolution, the measures provided for in resolution 217 (1965), as well as those initiated by Member States in implementation of that resolution, shall continue in effect,

Acting in accordance with Articles 39 and 41 of the United Nations Charter,

Determines that the present situation in Southern Rhodesia constitutes a threat to international peace and security;

Decides that all States Members of the United Nations shall prevent:

The import into their territories of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products and hides, skins and leather originating in Southern Rhodesia and exported therefrom after the date of the present resolution;

Any activities by their nationals or in their territories which promote or are calculated to promote the export

of these commodities from Southern Rhodesia and any dealings by their nationals or in their territories in any of these commodities originating in Southern Rhodesia and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Southern Rhodesia for the purposes of such activities or dealings:

Shipment in vessels or aircraft of their registration of any of these commodities originating in Southern Rhodesia and exported therefrom after the date of the present resolution;

Any activities by their nationals or in their territories which promote or are calculated to promote the sale or shipment to Southern Rhodesia of arms, ammunition of all types, military aircraft, military vehicles and equipment and materials for the manufacture and maintenance of arms and ammunition in Southern Rhodesia;

(*e*) Any activities by their nationals or in their territories which promote or are calculated to promote the supply to Southern Rhodesia of all other aircraft and motor vehicles and of equipment and materials for the manufacture, assembly, or maintenance of aircraft and motor vehicles in Southern Rhodesia; the shipment in vessels and aircraft of their registration of any such goods destined for Southern Rhodesia; and any activities by their nationals or in their territories which promote or are calculated to promote the manufacture or assembly of aircraft or motor vehicles in Southern Rhodesia;

Resolution 232 (1966) Adopted by the Security Council on 16 December 1966

(*f*) Participation in their territories or territories under their administration or in land or air transport facilities or by their nationals or vessels of their registration in the supply of oil or oil products to Southern Rhodesia;

notwithstanding any contracts entered into or licenses granted before the date of the present resolution;

3. *Reminds* Member States that the failure or refusal by any of them to implement the present resolution shall constitute a violation of Article 25 of the United Nations Charter;

4. *Reaffirms* the inalienable right of the people of Southern Rhodesia to freedom and independence in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly resolution 1514(XV) of 14 December 1960, and recognizes the legitimacy of their struggle to secure the enjoyment of their rights as set forth in the Charter of the United Nations;

5. *Calls upon* all States not to render financial or other economic aid to the illegal racist régime in Southern Rhodesia;

6. *Calls upon* all States Members of the United Nations to carry out this decision of the Security Council in accordance with Article 25 of the United Nations Charter;

7. *Urges*, having regard to the principles stated in Article 2 of the United Nations Charter, States not Members of the United Nations to act in accordance with the provisions of paragraph 2 of the present resolution;

Resolution 232 (1966) Adopted by the Security Council on 16 December 1966

8. *Calls upon* States Members of the United Nations or members of the specialized agencies to report to the Secretary-General the measures which each has taken in accordance with the provisions of paragraph 2 of the present resolution;

9. *Requests* the Secretary-General to report to the Council on the progress of the implementation of the present resolution, the first report to be submitted not later than 1 March 1967;

10. *Decides* to keep this item on its agenda for further action as appropriate in the light of developments.

Resolution 253 (1968) Adopted by the Security Council on 29 May 1968

The Security Council,

Recalling and reaffirming its resolutions 216 (1965) of 12 November 1965, 217 (1965) of 20 November 1965, 221 (1966) of 9 April 1966, and 232 (1966) of 16 December 1966,

Taking note of resolution 2262 (XXII) adopted by the General Assembly on 3 November 1967,

Noting with great concern that the measures taken so far have failed to bring the rebellion in Southern Rhodesia to an end,

Reaffirming that, to the extent not superseded in this resolution, the measures provided for in resolutions 217 (1965) of 20 November 1965 and 232 (1966) of 16 December 1966, as well as those initiated by Member States in implementation of those resolutions, shall continue in effect,

Gravely concerned that the measures taken by the Security Council have not been complied with by all States and that some States, contrary to resolution 232 (1966) of the Security Council and to their obligations under Article 25 of the Charter of the United Nations, have failed to prevent trade with the illegal régime in Southern Rhodesia,

Condemning the recent inhuman executions carried out by the illegal régime in Southern Rhodesia which have flagrantly affronted the conscience of mankind and have been universally condemned,

Affirming the primary responsibility of the Government of the United Kingdom to enable the people of

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Resolution 253 (1968) Adopted by the Security Council on 29 May 1968

Southern Rhodesia to achieve self-determination and independence, and in particular their responsibility for dealing with the prevailing situation,

Recognizing the legitimacy of the struggle of the people of Southern Rhodesia to secure the enjoyment of their rights as set forth in the Charter of the United Nations and in conformity with the objectives of General Assembly resolution 1514 (XV) of 14 December 1960,

Reaffirming its determination that the present situation in Southern Rhodesia constitutes a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Condemns* all measures of political repression, including arrests, detentions, trials and executions which violate fundamental freedoms and rights of the people of Southern Rhodesia, and calls upon the Government of the United Kingdom to take all possible measures to put an end to such actions;

2. *Calls upon* the United Kingdom as the administering Power in the discharge of its responsibility to take urgently all effective measures to bring to an end the rebellion in Southern Rhodesia, and enable the people to secure the enjoyment of their rights as set forth in the Charter of the United Nations and in conformity with the objectives of General Assembly resolution 1514 (XV);

3. *Decides* that, in furtherance of the objective of ending the rebellion, all States Members of the United Nations shall prevent:

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Resolution 253 (1968) Adopted by the Security Council on 29 May 1968

(*a*) The import into their territories of all commodities and products originating in Southern Rhodesia and exported therefrom after the date of this resolution (whether or not the commodities or products are for consumption or processing in their territories, whether or not they are imported in bond and whether or not any special legal status with respect to the import of goods is enjoyed by the port or other place where they are imported or stored);

(*b*) Any activities by their nationals or in their territories which would promote or are calculated to promote the export of any commodities or products from Southern Rhodesia; and any dealings by their nationals or in their territories in any commodities or products originating in Southern Rhodesia and exported therefrom after the date of this resolution, including in particular any transfer of funds to Southern Rhodesia for the purposes of such activities or dealings;

(*c*) The shipment in vessels or aircraft of their registration or under charter to their nationals, or the carriage (whether or not in bond) by land transport facilities across their territories of any commodities or products originating in Southern Rhodesia and exported therefrom after the date of this resolution;

(*d*) The sale or supply by their nationals or from their territories of any commodities or products (whether or not originating in their territories, but not including supplies intended strictly for medical purposes, educational equipment and material for use in schools and other educational institutions, publications, news material and, in

special humanitarian circumstances, food-stuffs) to any person or body in Southern Rhodesia or to any other person or body for the purposes of any business carried on in or operated from Southern Rhodesia, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply;

(*e*) The shipment in vessels or aircraft of their registration, or under charter to their nationals, or the carriage (whether or not in bond) by land transport facilities across their territories of any such commodities or products which are consigned to any person or body in Southern Rhodesia, or to any other person or body for the purposes of any business carried on in or operated from Southern Rhodesia;

4. *Decides* that all States Members of the United Nations shall not make available to the illegal régime in Southern Rhodesia or to any commercial, industrial or public utility undertaking, including tourist enterprises, in Southern Rhodesia any funds for investment or any other financial or economic resources and shall prevent their nationals and any persons within their territories from making available to the régime or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Southern Rhodesia, except payments exclusively for pensions or for strictly medical, humanitarian or educational purposes or for the provision of news material and in special humanitarian circumstances, foodstuffs;

5. *Decides* that all States Members of the United Nations shall:

Resolution 253 (1968) Adopted by the Security Council on 29 May 1968

(*a*) Prevent the entry into their territories, save on exceptional humanitarian grounds, of any person travelling on a Southern Rhodesian passport, regardless of its date of issue, or on a purported passport issued by or on behalf of the illegal régime in Southern Rhodesia;

(*b*) Take all possible measures to prevent the entry into their territories of persons whom they have reason to believe to be ordinarily resident in Southern Rhodesia and whom they have reason to believe to have furthered or encouraged, or to be likely to further or encourage, the unlawful actions of the illegal régime in Southern Rhodesia or any activities which are calculated to evade any measure decided upon in this resolution or resolution 232 (1966) of 16 December 1966;

6. *Decides* that all States Members of the United Nations shall prevent airline companies constituted in their territories and aircraft of their registration or under charter to their nationals from operating to or from Southern Rhodesia and from linking up with any airline company constituted or aircraft registered in Southern Rhodesia;

7. *Decides* that all States Members of the United Nations shall give effect to the decisions set out in operative paragraphs 3, 4, 5 and 6 of this resolution notwithstanding any contract entered into or license granted before the date of this resolution;

8. *Calls upon* all States Members of the United Nations or of the specialized agencies to take all possible measures to prevent activities by their nationals and persons in their territories promoting, assisting or encourag-

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Resolution 253 (1968) Adopted by the Security Council on 29 May 1968

ing emigration to Southern Rhodesia, with a view to stopping such emigration;

9. *Requests* all States Members of the United Nations or of the specialized agencies to take all possible further action under Article 41 of the Charter to deal with the situation in Southern Rhodesia, not excluding any of the measures provided in that Article;

10. *Emphasizes* the need for the withdrawal of all consular and trade representation in Southern Rhodesia, in addition to the provisions of operative paragraph 6 of resolution 217 (1965);

11. *Calls upon* all States Members of the United Nations to carry out these decisions of the Security Council in accordance with Article 25 of the Charter of the United Nations and reminds them that failure or refusal by any one of them to do so would constitute a violation of that Article;

12. *Deplores* the attitude of States that have not complied with their obligations under Article 25 of the Charter, and censures in particular those States which have persisted in trading with the illegal régime in defiance of the resolutions of the Security Council, and which have given active assistance to the régime;

13. *Urges* all States Members of the United Nations to render moral and material assistance to the people of Southern Rhodesia in their struggle to achieve their freedom and independence;

14. *Urges,* having regard to the principles stated in Article 2 of the Charter of the United Nations, States not

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Resolution 253 (1968) Adopted by the Security Council on 29 May 1968

Members of the United Nations to act in accordance with the provisions of the present resolution;

15. *Requests* States Members of the United Nations, the United Nations Organization, the specialized agencies, and other international organizations in the United Nations system to extend assistance to Zambia as a matter of priority with a view to helping it solve such special economic problems as it may be confronted with arising from the carrying out of these decisions of the Security Council;

16. *Calls upon* all States Members of the United Nations, and in particular those with primary responsibility under the Charter for the maintenance of international peace and security, to assist effectively in the implementation of the measures called for by the present resolution;

17. *Considers* that the United Kingdom as the administering Power should ensure that no settlement is reached without taking into account the views of the people of Southern Rhodesia, and in particular the political parties favouring majority rule, and that it is acceptable to the people of Southern Rhodesia as a whole;

18. *Calls upon* all States Members of the United Nations or of the specialized agencies to report to the Secretary-General by 1 August 1968 on measures taken to implement the present resolution;

19. *Requests* the Secretary-General to report to the Security Council on the progress of the implementation of this resolution, the first report to be made not later than 1 September 1968;

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Resolution 253 (1968) Adopted by the Security Council on 29 May 1968

20. *Decides* to establish, in accordance with rule 28 of the provisional rules of procedure of the Security Council, a committee of the Security Council to undertake the following tasks and to report to it with its observations:

(*a*) To examine such reports on the implementation of the present resolution as are submitted by the Secretary-General;

(*b*) To seek from any States Members of the United Nations or of the specialized agencies such further information regarding the trade of that State (including information regarding the commodies and products exempted from the prohibition contained in operative paragraph 3 (*d*) above) or regarding any activities by any nationals of that State or in its territories that may constitute an evasion of the measures decided upon in this resolution as it may consider necessary for the proper discharge of its duty to report to the Security Council;

21. *Requests* the United Kingdom, as the administering Power, to give maximum assistance to the committee, and to provide the committee with any information which it may receive in order that the measures envisaged in this resolution and resolution 232 (1966) may be rendered fully effective;

22. *Calls upon* all States Members of the United Nations, or of the specialized agencies, as well as the specialized agencies themselves, to supply such further information as may be sought by the Committee in pursuance of this resolution;

23. *Decides* to maintain this item on its agenda for further action as appropriate in the light of developments.

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Resolution 314 (1972) Adopted by the Security Council on 28 February 1972

The Security Council,

Having considered the recent developments concerning the question of Southern Rhodesia,

Recalling its resolutions 216 (1965) of 12 November 1965, 217 (1965) of 20 November 1965, 221 (1966) of 9 April 1966, 232 (1966) of 16 December 1966, 253 (1968) of 29 May 1968, 277 (1970) of 18 March 1970 and 288 (1970) of 17 November 1970,

Gravely concerned that certain States have not complied with the provisions of resolution 253 (1968), contrary to their obligations under Article 25 of the Charter of the United Nations,

Taking into account the fourth report of the Committee established in pursuance of Security Council resolution 253 (1968) (S/10229) and its interim report of 3 December 1971 (S/10408),

Acting in accordance with previous decisions of the Security Council on Southern Rhodesia, taken under *Chapter VII of the Charter,*

1. *Reaffirms* its decision that the present sanctions against Southern Rhodesia shall remain fully in force until the aims and objectives set out in resolution 253 (1968) are completely achieved;

2. *Urges* all States to implement fully all Security Council resolutions establishing sanctions against Southern Rhodesia, in accordance with their obligations under Article 25 and Article 2 (6) of the Charter, and deplores the attitude of those States which have persisted

Resolution 314 (1972) Adopted by the Security Council on 28 February 1972

in giving moral, political and economic assistance to the illegal régime;

3. *Declares* that any legislation passed, or act taken, by any State with a view to permitting, directly or indirectly, the importation from Southern Rhodesia of any commodity falling within the scope of the obligations imposed by resolution 253 (1968), including chrome ore, would undermine sanctions and would be contrary to the obligations of States;

4. *Calls upon* all States to refrain from taking any measures that would in any way permit or facilitate the importation from Southern Rhodesia of commodities falling within the scope of the obligations imposed by resolution 253 (1968), including chrome ore;

5. *Draws the attention* of all States to the need for increasing vigilance in implementing the provisions of resolution 253 (1968) and, accordingly, calls upon them to take more effective measures to ensure full implementation of the sanctions;

6. *Requests* the Committee established in pursuance of Security Council resolution 253 (1968) to meet as a matter of urgency to consider ways and means by which the implementation of sanctions may be ensured and to submit to the Security Council not later than 15 April 1972 a report containing recommendations in this respect, including any suggestions which the Committee might wish to make concerning its terms of reference and any other measures designed to ensure the effectiveness of its work;

7. *Requests* the Secretary-General to provide all appropriate assistance to the Committee in the discharge of its task.

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Sec. 5, United Nations Participation Act, as amended (22 U.S.C., § 287(c)):

§ 287c. *Enforcement of economic and communication sanctions; penalties*

(a) Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.

(b) Any person who willfully violates or evades or attempts to violate or evade any order, rule, or regulation issued by the President pursuant to subsection (a) of this section shall, upon conviction, be fined not more than $10,000 or, if a natural person, be imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation or evasion shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, or vehicle, or aircraft, concerned in such violation shall be forfeited to the United States.

Executive Order No. 11322
Jan. 5, 1967, 4 F.R. 119

TRANSACTIONS INVOLVING SOUTHERN RHODESIA

By virtue of the authority vested in me by the Constitution and laws of the United States, including section 5 of the United Nations Participation Act of 1945 (59 Stat. 620), as amended (22 U. S. C. 287c) [this section], and section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, and considering the measures which the Security Council of the United Nations, by Security Council Resolution No. 232 adopted December 16, 1966, has decided upon pursuant to article 41 of the Charter of the United Nations, and which it has called upon all members of the United Nations, including the United States, to apply it is hereby ordered:

Section 1. The following are prohibited effective immediately, notwithstanding any contracts entered into or licenses granted before the date of this Order:

(a) The importation into the United States of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products, and hides, skins and leather originating in Southern Rhodesia and exported therefrom after December 16, 1966, or products made therefrom in Southern Rhodesia or elsewhere.

(b) Any activities by any person subject to the jurisdiction of the United States, which promote or are calculated to promote the export from Southern Rhodesia after December 16, 1966, of any of the commodities specified in subsection (a) of this section originating in Southern Rhodesia, and any dealings by any such per-

son in any such commodities or in products made therefrom in Southern Rhodesia or elsewhere, including in particular any transfer of funds to Southern Rhodesia for the purposes of such activities or dealings: *Provided,* however, that the prohibition against the dealing in commodities exported from Southern Rhodesia or products made therefrom shall not apply to any such commodities or products which, prior to the date of this Order, had been imported into the United States.

(c) Shipment in vessels or aircraft of United States registration of any of the commodities specified in subsection (a) of this section originating in Southern Rhodesia, and exported therefrom after December 16, 1966, or products made therefrom in Southern Rhodesia or elsewhere.

(d) Any activities by any person subject to the jurisdiction of the United States, which promote or are calculated to promote the sale or shipment to Southern Rhodesia of arms, ammunition of all types, military aircraft, military vehicles and equipment, and materials for the manufacture and maintenance of arms and ammunition in Southern Rhodesia.

(e) Any activities by any person subject to the jurisdiction of the United States, which promote or are calculated to promote the supply to Southern Rhodesia of all other aircraft and motor vehicles, and of equipment and materials for the manufacture, assembly, or maintenance of aircraft or motor vehicles in Southern Rhodesia; the shipment in vessels or aircraft of United States registration of any such goods destined for Southern Rhodesia; and any activities by any persons subject to the juris-

diction of the United States, which promote or are calculated to promote the manufacture or assembly of aircraft or motor vehicles in Southern Rhodesia.

(f) Any participation in the supply of oil or oil products to Southern Rhodesia (i) by any person subject to the jurisdiction of the United States, or (ii) by vessels or aircraft of United States registration, or (iii) by the use of any land or air transport facility located in the United States.

Sec. 2. The functions and responsibilities for the enforcement of the foregoing prohibitions are delegated as follows:

(a) To the Secretary of State, the function and responsibility of enforcement relating to the importation into, or exportation from the United States of articles, including technical data, the control of the importation or exportation of which is provided for in section 414 of the Mutual Security Act of 1954 (68 Stat. 848), as amended (22 U.S.C. 1934) [section 1934 of this title], and has been delegated to the Secretary of State by section 101 of Executive Order No. 10973 of September 3, 1961 [set out as a note under section 2381 of this title].

(b) To the Secretary of Commerce, the function and responsibility of enforcement relating to—

(i) the exportation from the United States of articles other than the articles, including technical data, referred to in subsection (a) of this section; and

(ii) the transportation in vessels or aircraft of United States registration of any commodities the transportation of which is prohibited by section 1 of this Order.

Executive Order No. 11322
Jan. 5, 1967, 4 F.R. 119

(c) To the Secretary of the Treasury, the function and responsibility of enforcement to the extent not delegated under subsections (a) or (b) of this section.

Sec. 3. The Secretary of State, the Secretary of the Treasury and the Secretary of Commerce shall exercise any authority which such officer may have apart from the United Nations Participation Act of 1945 [this chapter] or this Order so as to give full effect to this Order and Security Council Resolution No. 232.

Sec. 4. (a) In carrying out their respective functions and responsibilities under this Order, the Secretary of the Treasury and the Secretary of Commerce shall consult with the Secretary of State. Each such Secretary shall consult, as appropriate, with other government agencies and private persons.

(b) Each such Secretary shall issue such regulations, licenses, or other authorizations as he considers necessary to carry out the purposes of this Order and Security Council Resolution No. 232.

Sec. 5. (a) The term "United States", as used in this Order in a geographical sense, means all territory subject to the jurisdiction of the United States.

(b) The term "person" means an individual, partnership, association, or other unincorporated body of individuals, or corporation.

LYNDON B. JOHNSON.

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Executive Order No. 11419
July 29, 1968, 33 F.R. 10837

TRADE AND OTHER TRANSACTIONS INVOLVING SOUTHERN RHODESIA

By virtue of the authority vested in me by the Constitution and laws of the United States, including section 5 of the United Nations Participation Act of 1945 (59 Stat. 620), as amended (22 U.S.C. 287c) [this section], and section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, and considering the measures which the Security Council of the United Nations by Security Council Resolution No. 253 adopted May 29, 1968, has decided upon pursuant to article 41 of the Charter of the United Nations, and which it has called upon all members of the United Nations, including the United States, to apply, it is hereby ordered:

Section 1. In addition to the prohibitions of section 1 of Executive Order No. 11322 of January 5, 1967 [set out as a note under this section], the following are prohibited effective immediately, notwithstanding any contracts entered into or licenses granted before the date of this Order:

(a) Importation into the United States of any commodities or products originating in Southern Rhodesia and exported therefrom after May 29, 1968.

(b) Any activities by any person subject to the jurisdiction of the United States which promote or are calculated to promote the export from Southern Rhodesia after May 29, 1968, of any commodities or products originating in

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Southern Rhodesia, and any dealings by any such person in any such commodities or products, including in particular any transfer of funds to Southern Rhodesia for the purposes of such activities or dealings; *Provided,* however, that the prohibition against the dealing in commodities or products exported from Southern Rhodesia shall not apply to any such commodities or products which, prior to the date of this Order, had been lawfully imported into the United States.

(c) Carriage in vessels or aircraft of United States registration or under charter to any person subject to the jurisdiction of the United States of any commodities or products originating in Southern Rhodesia and exported therefrom after May 29, 1968.

(d) Sale or supply by any person subject to the jurisdiction of the United States, or any other activities by any such person which promote or are calculated to promote the sale or supply, to any person or body in Southern Rhodesia or to any person or body for the purposes of any business carried on in or operated from Southern Rhodesia of any commodities or products. Such activities, including carriage in vessels or aircraft, may be authorized with respect to supplies intended strictly for medical purposes, educational equipment and material for use in schools and other educational institutions, publications, news material, and foodstuffs required by special humanitarian circumstances.

(e) Carriage in vessels or aircraft of United States registration or under charter to any person subject to the jurisdiction of the United States of any commodities or products consigned to any person or body in Southern

Rhodesia, or to any person or body for the purposes of any business carried on in or operated from Southern Rhodesia.

(f) Transfer by any person subject to the jurisdiction of the United States directly or indirectly to any person or body in Southern Rhodesia of any funds or other financial or economic resources. Payments exclusively for pensions, for strictly medical, humanitarian or educational purposes, for the provision of news material or for foodstuffs required by special humanitarian circumstances may be authorized.

(g) Operation of any United States air carrier or aircraft owned or chartered by any person subject to the jurisdiction of the United States or of United States registration (i) to or from Southern Rhodesia or (ii) in coordination with any airline company constituted or aircraft registered in Southern Rhodesia.

Sec. 2. The functions and responsibilities for the enforcement of the foregoing prohibitions, and of those prohibitions of Executive Order No. 11322 of January 5, 1967 specified below, are delegated as follows:

(a) To the Secretary of Commerce, the function and responsibility of enforcement relating to—

(i) the exportation from the United States of commodities and products other than those articles referred to in section 2(a) of Executive Order No. 11322 of January 5, 1967; and

(ii) the carriage in vessels of any commodities or products the carriage of which is prohibited by section 1 of

this Order or by section 1 of Executive Order No. 11322 of January 5, 1967.

(b) To the Secretary of Transportation, the function and responsibility of enforcement relating to the operation of air carriers and aircraft and the carriage in aircraft of any commodities or products the carriage of which is prohibited by section 1 of this Order or by section 1 of Executive Order No. 11322 of January 5, 1967.

(c) To the Secretary of the Treasury, the function and responsibility of enforcement to the extent not previously delegated in section 2 of Executive Order No. 11322 of January 5, 1967, and not delegated under subsections (a) and (b) of this section.

Sec. 3. The Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Transportation shall exercise any authority which such officer may have apart from the United Nations Participation Act of 1945 [sections 287-287e of this title] or this Order so as to give full effect to this Order and Security Council Resolution No. 253.

Sec. 4. (a) In carrying out their respective functions and responsibilities under this Order, the Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Transportation shall consult with the Secretary of State. Each such Secretary shall consult, as appropriate, with other government agencies and private persons.

(b) Each such Secretary shall issue such regulations, licenses or other authorizations as he considers necessary to carry out the purposes of this Order and Security Council Resolution No. 253.

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Executive Order No. 11419
July 29, 1968, 33 F.R. 10837

Sec. 5. (a) The term "United States," as used in this Order in a geographical sense, means all territory subject to the jurisdiction of the United States.

(b) The term "person" means an individual, partnership, association or other unincorporated body of individuals, or corporation.

Sec. 6. Executive Order No. 11322 of January 5, 1967, implementing United Nations Security Council Resolution No. 232 of December 16, 1966, shall continue in effect as modified by sections 2, 3, and 4 of this Order.

LYNDON B. JOHNSON

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Byrd Amendment (Sec. 503 of the Military Procurement Act of 1971, effecting an amendment to the Strategic and Critical Materials Procurement Act, 50 U.S.C., § 98-98(h), 85 Stat. 427)

"Sec. 10. Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. § 1202), for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law."

General License issued by the Office of Foreign Assets Control, 37 F. Reg. 1108

Title 31—Money and Finance: Treasury
Chapter V—Office of Foreign Assets Control, Department of the Treasury

Part 530—Rhodesian Sanctions Regulations

Removal of Controls on Importation of Rhodesian Strategic and Critical Materials

A general license is being issued under the Rhodesian Sanctions Regulations authorizing imports of strategic and critical materials of Southern Rhodesian origin, and of ferrochrome produced from Rhodesian chromite. This license is issued in connection with the enactment of Title V, section 503, Public Law 92-156, 85 Stat. 427 (November 17, 1971). The license also authorizes transfers in payment for commodities the importation of which is licensed by the section, to the extent that such transfers do not exceed the amounts customarily paid on the world market for comparable commodities.

Part 530 is amended by adding a new section, reading as follows:

§ 530.518 *Certain materials listed under Strategic and Critical Material-Stockpiling Act.*

(a) Except as provided in paragraph (b) of this section, all transactions incidental to the importation into the United States of the following commodities are hereby authorized:

(1) Chromium: Ore and concentrates thereof Southern Rhodesian origin—Schedule 6, Part 1, Item 601.15, Tariff Schedules of the United States (TSUS).

General License issued by the Office of Foreign Assets Control, 37 F. Reg. 1108

(2) Ferrochrome produced in any country from chromium ore or concentrates of Southern Rhodesian origin.

(3) Any other material of Southern Rhodesian origin determined to be strategic and critical pursuant to the provisions of the Strategic and Critical Materials Stock Piling Act (60 Stat. 596; 50 U.S.C. 98-98h), so long as the importation of such material from any country or area listed in general headnote 3(e) of the Tariff Schedules of the United States (19 U.S.C. 1202(3)(e)) is not prohibited by any provision of law.

(b) This section does not authorize payment of the purchase price for a commodity imported under this section if such price exceeds the price per pound customarily paid at the time of purchase on the world market for that commodity in arms-length dealings between other buyers and sellers.

(c) (1) District Directors of Customs shall not accept or allow any entry with respect to merchandise imported under this section unless it is accompanied by a report containing the following information:

(i) Name and address of importer on record

(ii) Name and address of buyer

(iii) Name of commodity

(iv) Quantity entered (in pounds)

(v) Name and address of shipper

(vi) Name and address of seller

(vii) Port of exportation

(viii) Price per pound f.o.b. port of exportation

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(ix) Details of payment (letter of credit, bank transfer, etc., including names of banks and identifying numbers for payment instruments).

(2) The district director shall promptly forward this report to the Office of Foreign Assets Control, Treasury Department, Washington, D.C. 20220. The district director shall also satisfy himself that the importer or his agent has mailed a duplicate copy of this report directly to the Office of Foreign Assets Control.

(3) In cases where more than one entry is made with respect to the same lot of merchandise (e.g., warehouse entry; in-transit entry; consumption entry) only one such report is required to be filed with respect to that lot.

STANLEY L. SOMMERFIELD,
Acting Director,
Office of Foreign Assets Control.

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Letter from the Department of State

DEPARTMENT OF STATE
Washington

May 20, 1972

The Honorable
Gale W. McGee,
United States Senate,
Washington, D. C.

Dear Senator McGee:

In response to your request, I am writing to confirm the Administration's support for Section 503 of the State Department Authorization Bill, S. 3526, which would repeal existing legislation permitting the importation of chrome and other strategic materials from Southern Rhodesia.

The Administration opposed that legislation last year and considers that there are several compelling reasons for its repeal now. As we pointed out prior to passage, the measure adopted last year has put the United States in violation of its international legal obligations: a most serious step which the Administration then maintained and still believes was not warranted by circumstances. The legislation now under consideration by the Senate would allow the United States once again to comply fully with its international treaty obligations.

Repeal now would serve to make us less vulnerable to unfavorable international reaction. As a result of the legislation now in force, our international interests have suffered in other respects. In Africa, where our position on Rhodesia has heretofore been seen as a test of

our commitment to self-determination and racial equality, our credibility has suffered. The depth of African concern has been particularly strong in some nations where our interests far outweigh those in Rhodesia. In the United Nations, we will face, with each shipment of chrome or other commodity, an increasing erosion of our position. While we have sought and continue to seek means of making the existing sanctions against Rhodesia more effective, and less liable to circumvention by others, our ability to do so is seriously limited by the legislation now in effect.

Finally, the Administration continues to hold the view that neither economic nor national security considerations affecting chrome are sufficiently compelling to compensate for the adverse foreign policy consequences of the legislation now in effect. There are 2.2 million tons of excess chrome ore in the stockpile; legislation authorizing release of 1.3 million tons has already been approved this year by the Senate. This amount alone would meet our total chrome needs for about 18 months, and defense requirements amount to only about 10% of total needs. Industry stocks are high, and we continue to have access to chrome ore from a variety of other foreign sources. In short, there was no chrome shortage last year and there is none now. Moreover, the legislation now in effect permits the importation from Rhodesia of other strategic list items in addition to chrome, and under it we may expect a variety of materials including asbestos, nickel, and other minerals to be imported. The adverse international reactions to such transactions in our judgment would outweigh any possible economic advantage, and there is on strategic grounds no need to import any of these materials from Rhodesia.

Letter from the Department of State

As will be clear from the foregoing, we have been increasingly concerned about the serious effects of the existing legislation upon United States foreign policy interests. For all of the reasons mentioned, the Administration believes that the passage of Section 503 would further those interests.

With kindest regards,

Sincerely,

JOHN M. IRWIN II
John M. Irwin II
Acting Secretary

Excerpt from Report of the Office of Emergency Preparedness as of June 30, 1971

[PHOTOSTATS]

(Opposite) ☛

SUMMARY OF GOVERNMENT INVENTORIES, OBJECTIVES, EXCESSES AND BALANCE OF DISPOSAL AUTHORIZATIONS

Basic Stockpile Materials
June 30, 1971

(Market Value - $ Millions)

Commodity	Unit	Objective	Total Inventory[1]	Market Value[2]	Uncommitted Excess	Market Value[2]	Balance of Disposal Authorization
1. Aluminum	ST	450,000	1,281,267	$743.1	831,267	$482.1	831,267[3]
2. Aluminum Oxide, Fused	ST	300,000	427,495	76.1	127,495	18.9	127,495
3. Antimony	ST	40,700	46,747	63.0	6,047[4]	7.6	0
4. Asbestos, Amosite	ST	18,400	59,315	12.6	40,915[4]	8.7	8,076
5. Asbestos, Chrysotile	ST	13,700	12,029	5.9	1,086	0.2	1,073
6. Bauxite, Metal, Jamaica	LDT	5,000,000	8,858,881	120.3	3,858,881[5]	52.4	714,000
7. Bauxite, Metal, Surinam	LDT	5,300,000	5,300,000	54.3	0	0	0
8. Bauxite, Refractory	LCT	173,000	173,000	8.8	0	0	0
9. Beryl	ST	28,000	40,341	70.7	12,341[6]	27.0	2,451
10. Bismuth	LB	2,100,000	2,335,457	14.0	235,457	1.4	235,457
11. Cadmium	LB	6,000,000	10,147,806	22.8	4,147,806	9.3	4,147,806
12. Castor Oil	LB	50,000,000	58,449,720	11.0	8,449,720	1.4	8,425,478
13. Chromite, Chemical	SDT	250,000	570,449	12.7	320,449[4]	7.2	0
14. Chromite, Metallurgical	SDT	3,086,800	5,331,613	596.6	2,244,813[7]	143.7	930,589
15. Chromite, Refractory	SDT	368,000	1,195,249	32.1	827,249	22.2	795,249
16. Chromium Metal	ST	3,775	8,013	18.4	4,238[4]	9.7	0
17. Cobalt	LB	38,200,000	77,701,349	169.2	39,501,349	85.1	39,501,349
18. Columbium	LB	1,176,000	9,408,494	22.9	5,946,463[4]	10.0	935,747
19. Copper	ST	775,000	258,682	279.6	0	0	0
20. Cordage Fibers, Abaca	LB	25,000,000	64,836,564	15.9	39,836,564[4]	9.8	14,924,929
21. Cordage Fibers, Sisal	LB	100,000,000	198,771,886	16.1	98,771,886[4]	8.0	0
22. Diamond Dies, Small	PC	25,000	25,473	1.0	473	0.02	0
23. Diamond, Industrial Bort	KT	23,700,000	42,611,479	101.4	18,911,479[4]	42.6	0
24. Diamond, Industrial Stones	KT	20,000,000	25,141,634	311.6	5,141,634[4]	78.0	177,840
25. Feathers and Down	LB	3,000,000	3,000,000	10.9	0	0	0
26. Fluorspar, Acid Grade	SDT	540,000	891,974	67.8	1,974[8]	.1	1,974
27. Fluorspar, Metallurgical	SDT	850,000	411,788	24.7	0	0	0
28. Graphite, Natural, Ceylon	ST	5,500	5,499	1.0	0	0	0
29. Graphite, Natural, Malagasy	ST	18,000	31,197	3.5	13,257	1.5	13,257
30. Graphite, Other	ST	2,600	2,800	0.6	0	0	0
31. Iodine	LB	8,000,000	8,011,814	15.5	11,814	0.02	0
32. Jewel Bearings	PC	57,500,000	59,454,246	19.2	14,726,698[10]	0.4	0
33. Lead	ST	530,000	1,133,905	328.8	603,905[7]	175.1	105,772
34. Manganese, Battery, Natural	SDT	135,000	308,350	27.3	173,350	14.5	173,350
35. Manganese, Battery, Synthetic Dioxide	SDT	1,900	19,667	9.1	17,767[4]	8.2	12,962

SUMMARY OF GOVERNMENT INVENTORIES, OBJECTIVES, EXCESSES AND BALANCE OF DISPOSAL AUTHORIZATIONS (Continued)

Basic Stockpile Materials
June 30, 1971

(Market Value - $ Millions)

Commodity	Unit	Objective	Total Inventory[1]	Market Value[2]	Uncommitted Excess	Market Value[2]	Balance of Disposal Authorization
36. Manganese Ore, Chemical A	SDT	35,000	146,914	$ 10.3	111,914	$ 7.8	111,914
37. Manganese Ore, Chemical B	SDT	35,000	100,838	7.1	65,838	4.6	65,838
38. Manganese, Metallurgical	SDT	4,000,000	11,896,166	430.1	7,949,791[4]	241.9	3,519,902
39. Mercury	FL	126,500	200,105	58.0	73,605[5]	21.3	0
40. Mica, Muscovite Block St./better	LB	6,000,000	14,410,033	54.6	7,650,533[6] [11]	15.7	6,308,798
41. Mica, Muscovite Film, 1 & 2 quality	LB	2,000,000	1,468,980	16.5	640[6] [11]	0	640
42. Mica, Muscovite Splittings	LB	19,000,000	41,704,558	50.0	22,704,558[6]	27.2	21,004,683
43. Mica, Phlogopite Block	LB	150,000	168,580	0.1	151,859	0.03	151,859
44. Mica, Phlogopite Splittings	LB	950,000	4,806,943	7.7	3,856,943[6]	6.2	3,507,345
45. Molybdenum	LB	0	42,603,508	76.9	42,603,508[7]	76.9	6,090,723
46. Nickel	ST	0	40,006	106.1	40,006[7]	106.1	0
47. Opium	AvLB	143,000	141,602	14.0	88	0.005	0
48. Platinum Group, Iridium	TrOz	17,000	17,176	2.6	184[6]	0.03	0
49. Platinum Group, Palladium	TrOz	1,300,000	1,249,738	46.2	0	0	0
50. Platinum Group, Platinum	TrOz	555,000	450,076	54.0	0	0	0
51. Pyrethrum	LB	63,375[13]	63,375	0.6	0	0	0
52. Quartz Crystals	LB	320,000	4,974,653	54.1	4,654,653[6]	50.4	4,324,653
53. Quinidine	OZ	2,000,000	1,800,377	4.2	0	0	0
54. Quinine	OZ	4,130,000	3,548,161	5.8	0	0	0
55. Rubber	LT	200,000	341,924	133.1	141,924	55.3	141,924
56. Rutile	SDT	100,000	56,525	10.5	0	0	0
57. Sapphire & Ruby	KT	18,000,000	16,305,592	0.2	0	0	0
58. Shellac	LB	1,000,000	6,252,029	2.9	5,252,029[6]	2.4	2,352,029
59. Silicon Carbide, Crude	ST	30,000	196,453	42.6	166,453[7]	36.1	0
60. Silver	(fine)TrOz	139,500,000	139,500,000	220.0	0	0	0
61. Sperm Oil	LB	23,400,000	23,402,661	6.1	0	0	0
62. Talc, Steatite Block & Lump	ST	200	1,204	0.4	1,004	0.3	1,004
63. Tantalum	LB	3,400,000	4,181,102	39.2	968,123[14]	8.0	0
64. Thorium Oxide	ST	40	40[15]	0.3	0	0	0
65. Tin	LT	232,000	251,632	935.7	19,632	73.0	19,632
66. Titanium Sponge	ST	33,500	35,015	85.6	8,514	18.0	8,514
67. Tungsten	LB	60,000,000	129,141,867	368.0	69,141,867	194.4	68,886,097
68. Vanadium	ST	540	3,307	21.5	2,767[6]	18.6	1,567

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SUMMARY OF GOVERNMENT INVENTORIES, OBJECTIVES, EXCESSES AND BALANCE OF DISPOSAL AUTHORIZATIONS (Continued)

Basic Stockpile Materials
June 30, 1971

(Market Value - $ Millions)

Commodity	Unit	Objective	Total Inventory[1]	Market Value[2]	Uncommitted Excess	Market Value[2]	Balance of Disposal Authorization
69. Vegetable Tannin, Chestnut	LT	9,500	21,297	$ 7.3	11,797[4]	$ 4.7	11,282
70. Vegetable Tannin, Quebracho	LT	50,600	188,103	55.1	137,503[4]	38.8	102,216
71. Vegetable Tannin, Wattle	LT	9,500	34,289	8.8	24,789[4]	6.4	19,328
72. Zinc	ST	560,000	1,119,958	358.4	559,958[7]	179.2	44,784

FOOTNOTES

[1] Total inventory consists of stockpile and nonstockpile grades and reflects uncommitted balance.

[2] Market values are estimated from prices at which similar materials are being traded; or in the absence of trading data, at an estimate of the price which would prevail in the market. Prices used are unadjusted for normal premiums and discounts relating to contained qualities or normal freight allowances. *The market values do not necessarily reflect the amount that would be realized at time of sale.*

[3] Committed for sale but undelivered under long term contracts.

[4] Balance of excess pending Congressional approval.

[5] Balance of excess; disposal planning deferred due to market conditions.

[6] Excess quantity includes 3,617 ST in beryllium copper master alloy and 3,160 ST in beryllium metal.

[7] Balance of excess deferred by the Congress.

[8] Excludes that quantity represented by tantalum contained in columbium minerals.

[9] Excludes 350,000 SDT credited to metallurgical fluorspar.

[10] Factory inspecting feasibility of reworking bearings to meet stockpile specifications.

[11] Excludes 759,500 LBS credited to mica, muscovite film.

[12] Excludes 51,087 LBS nonstockpile quality material for which Congressional approval has been requested. Deficit in objective covered by crediting muscovite block, ST/better mica against this requirement.

[13] Objective established July 14, 1971.

[14] Material required in upgrading.

[15] Thorium nitrate credited as 40 ST thorium oxide, $0.3 million market value.

ABBREVIATIONS

FL - Flask
KT - Carat
LB - Pound
LCT - Long Calcined Ton
LDT - Long Dry Ton
LT - Long Ton
OZ - Ounce
PC - Piece
SDT - Short Dry Ton
ST - Short Ton
TrOz - Troy Ounce

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Exhibit A

Opinion of the United States District Court for the District of Columbia, dated June 19, 1972

Morton Stavis, Esq., Doris Peterson, Esq., Andre M. Surena, Esq., Peter Weiss, Esq., Rhonda Copelon Schoenbrod, Esq., Herbert O. Reid, Sr., Esq., David Rein, Esq., Joel Carlson, Esq., a member of the Bar of South Africa and Southwest Africa, admitted *pro hac vice,* and Haywood Burns, Attorneys for Plaintiffs.

James M. Johnstone, Esq., L. Mark Wine, Esq., Thomas C. Arthur, Esq., Kirkland, Ellis & Rowe, Washington, D. C., and Patrick J. Morgan, Esq., of New York for the Defendant, Union Carbide Corporation.

Harold H. Titis, Jr., United States Attorney, and Robert S. Rankin, Jr., Assistant United States Attorney, for the defendants John B. Connally, Stanley L. Sommerfield, and Myles J. Ambrose.

William W. Scott, Esq., of Collier, Shannon, Rill and Edwards, Washington, D. C., and William S. Rawls, Esq., of Ballard, Spahr, Andrews and Ingersoll, Philadelphia, Pennsylvania, appearing specially for the Defendant Foote Mineral Company.

* * *

In 1965, a white minority government declared its Unilateral Independence from Great Britain and constituted itself as Southern Rhodesia. The acts of this white minority to dominate and segregate a black majority on a black continent precipitated action by the United Nations. The United States of America, in concert with the

other member nations of the United Nations Security Council, resolved that this Rhodesian government was "illegal." Mandatory economic sanctions were passed designed to cripple the newly constituted Ian Smith regime. Six years later, the United States decided it was in their best economic interests to import "strategically denoted goods" from this same "illegal" government.[1] The sanctions broken, it is alleged the United Nations efforts to ruin Ian Smith's racist society are doomed.

This suit seeks permanent injunctive relief preventing the importation from Southern Rhodesia of metallurgical chromite and other materials.[2] Further, the suit seeks a permanent mandatory order directing government officials to seize and impound items illegally imported into the United States. A declaratory judgment is also requested stating that the General License issued by the Office of Foreign Asset Control of the United States Treasury Department (37 Fed. Reg. 1108) authorizing imports of metallurgical chromite and other materials from Southern Rhodesia is null and void, and not authorized by the

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[1] The Court recognizes by this suit that there remain idealistic persons desirous of placing humanity above the price differential between Russian and Rhodesian chromite.

[2] The importation of the chromite being barred by resolutions adopted by the United Nations Security Council and implemented by Executive Orders No. 11322, January 5, 1967, and No. 11419, July 29, 1968.

Exhibit A

"Byrd Amendment," § 503 of the Military Procurement Act of 1971, P.L. 92-156.[3]

The plaintiffs in this case consist of American Congressmen, Southern Rhodesian citizens presently domiciled in the United States, Committees of both American and Foreign origin that are dedicated to upholding law and justice and energized against racism, missionary groups that have been harassed by Rhodesian officials and denied an ability to conduct business in Rhodesia, Rhodesian refugee groups representing oppressed black Rhodesians, and authors whose books are presently banned by the Censors of the Rhodesian Government.

The defendants include John B. Connally, as Secretary of the Treasury, Stanley Sommerfield, as Acting Director of the Office of Foreign Assets Control, Myles J. Ambrose, as Commissioner of the Bureau of Customs, and two corporations, Foote Mineral Company and Union Carbide Corporation, for importing Rhodesian chromite under licenses granted by the Office of Foreign Assets Control.

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[3] The Amendment in pertinent part reads:

> "Sec. 10. Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. 1202), for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law.

Exhibit A

On April 20, 1972, this Court heard argument on and denied plaintiffs' Motion For A Temporary Restraining Order. On April 28, 1972, a hearing was held concerning plaintiffs' Motion For A Preliminary Injunction. This request was similarly denied. Hearing was held May 25, 1972, on Motions to Dismiss or For Summary Judgment. These motions were taken under advisement.[4]

The questions of law have been exhaustively briefed and argued. There are several sensitive questions of law in issue. It is this Courts' determination that resolution of one major issue pretermits all other considerations. For the following reasons, it is held as a matter of law that none of these plaintiffs possess the requisite *standing* to bring this suit.

There is here the necessity to discuss briefly the history and rational of the "standing" requirement in Federal suits.[5] Judicial power of Federal Courts is restricted by Article III of the Constitution to "cases" and "controversies." These words have been described as having, "an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government."[6] They serve

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[4] The Court, on May 30, 1972, granted Foote Mineral Company's Motion To Dismiss For Lack Of Personal Jurisdiction.

[5] The legal term "standing" has been construed, narrowed, and reviewed in several recent cases. Sierra Club v. Morton, 40 U. S. L. W. 4397, April 19, 1972; EDF v. EPA, No. 71-1365 (D. C. Cir. May 5, 1972, footnote One); Johnson v. C. B. Morton, 456 F. 2d 68 (5th Cir. 1972).

[6] Flast v. Cohen, 392 U. S. 83, 94 (1968).

as reminders that Federal courts are ones of limited jurisdiction and that courts should only decide cases that are presented in an adversary context, historically viewed as capable of judicial resolution.[7] These words aid the judiciary in defining its role in the tripartite allocation of power, insuring that Federal courts will not trespass into circles denoted for the other branches of our government. The limitations placed upon Federal courts by the "case" and "controversy" doctrine are summed in one term of art—Justiciability.

Justiciability has many facets, standing being but one. The standing question is surrounded by the same complexities and vagaries that inhere in justiciability. The concept of standing is occasionally amorphous, serving periodically as a shorthand expression for all facets of justiciability.[8] Out of this complexity, certain straight lines are discernable.

The paramount focus of standing is on the party seeking to get his complaint adjudicated before a Federal court. Does the party allege such a personal stake in the outcome as to assure concrete adversity and sharpened presentations of issues? Is the person the proper party to request an adjudication of the particular issues? In ruling on standing, it is appropriate for the Court to further view the substantive issues to determine if there is a logical nexus between the status asserted and the claim sought to be adjudicated.[9] All these questions must be answered favorably for standing to be achieved.

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[7] *Id.* at 95.

[8] *Id.* at 99.

[9] *Id.* at 99, 100, 102.

Exhibit A

The Supreme Court, in *Association of Data Processing Service Organizations* v. *Camp*, 397 U. S. 150 (1970) formulated a dual test for standing. This "modernized law of standing" remains intact, reaffirmed by recent Supreme Court pronouncement.[10] The dual test inquires first whether the plaintiffs alleged that the challenged action has caused them "injury in fact," economic or otherwise. Secondly, the test queries whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute, "treaty" or constitutional guarantee in question. This dual test for standing verily recognized that "injury in fact," suffered or anticipated, included aesthetic, conservational, environmental, recreational and economic interests.[11] The situation remains here that when the emphasis is placed on whether the person invoking a Federal court's jurisdiction has suffered or anticipates "injury in fact," the weakness of plaintiffs' standing argument crystalizes.

Recapitulating, the following facts allegedly produced the injury to plaintiffs in this case. In 1965, the white minority population of Southern Rhodesia seized power, declared a Unilateral Declaration of Independence from Great Britain, and announced its intention to retain white minority rule over the majority black population of Rhodesia. This white government has expelled or otherwise prevented some of the plaintiffs from enjoying life, liberty, property or the pursuits of happiness within the confines of Southern Rhodesia, has denied certain plain-

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[10] Sierra Club v. Morton, 40 U. S. L. W. 4397, April 19, 1972.

[11] Association of Data Processing Service Organization v. Camp, 397 U. S. 150 (1970).

tiffs travel privileges to Rhodesia, and has banned the sale of books written by other of the plaintiffs.

Second, the United Nations Security Council adopted mandatory embargo resolutions designed to collapse the newly constituted government of Southern Rhodesia. Plaintiffs claim that this mandatory embargo ameliorates their alleged injury. The United States of America joined in these resolutions and implemented them through Executive Orders of the President.

Third, in 1971, the Congress of the United States passed the "Byrd Amendment" permitting the importation of Rhodesian chromite into the United States as long as cromite was imported from any communist dominated country. General licenses were issued to Foote Mineral Company and Union Carbide Corporation permitting them to import chromite from Southern Rhodesia, ostensibly in violation of the letter and spirit of the United Nations sanctions.

Fourth, plaintiffs all claim that the action of the United States Congress "injures them in fact." This action gives aid and comfort to the economy of an "illegal" government in contravention of the United Nations mandatory economic sanctions. These sanctions were designed to assuage plaintiffs' original injury created by the white minority takeover in Southern Rhodesia.

Upon this record, it is apparent that the injury to these plaintiffs stems originally and wholly from the fact that the white minority government still reigns in Rhodesia. Plaintiffs contend that without the "Byrd Amendment" the continuance of the "illegal" Rhodesian government may not be possible, therefore, their interests are directly

injured by the action of Congress. It is the opinion of this Court that, while tangentially related to the original injury, this Congressional action does not suffice to create either "injury in fact" or a federal nexus to the injury suffered by plaintiffs. A change in Congressional priorities bottoms all that can be said to have a causal connection to the alleged injury in this case. This fact is best illustrated by reviewing the injury to each plaintiff named in the amended complaint.

Plaintiffs Shirley A. Chisholm, William Lacy Clay, George Washington Collins, Ronald V. Dellums, Walter E. Fauntroy, Augustus F. Hawkins, Ralph H. Metcalfe, Robert N. C. Nix. Episcopal Churchmen For Southern Africa, IFCO-ACTION, Southern Africa Committee, Southern Christian Leadership Conference, Edward Weisband, Bert B. Lockwood, Jr., Shelly Fenchel, Joel Carlson, Robert Goldschmidt, Robert Janosik, Nigel Rodley, Diane Flaherty, and Antoine Van Dongen all fail to allege in their amended complaint that they themselves suffer or will suffer personal individualized injury within the meaning of the recent Supreme Court decision, *Sierra Club* v. *Rogers C. B. Morton*, No. 70-34, April 18, 1972, 40 U. S. L. W. 4397, April 19, 1972. There, the Supreme Court decided that the "injury in fact" test for standing requires "more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.[12] The above-named plaintiffs do not meet this requirement.

Of the remaining plaintiffs, Charles C. Diggs, John Conyers, Charles B. Rangel, Louis B. Stokes, and Thomas M. Franck, are all American citizens that allege "injury

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[12] *Supra*, note 10.

in fact" from the refusal of the Rhodesian government to permit them entry into Rhodesia. The American Committee on Africa alleges "injury in fact" from the circumstances that its Chairman, George Houser, is not permitted entry into the country of Rhodesia. The Council For Christian Social Action of the United Church of Christ claims "injury in fact" because some of their missionaries have been arrested and deported from Rhodesia. Davis M'Gabe and the Zimbabwe African National Union claim "injury in fact" from the existence of the white minority regime in Rhodesia, because, as "outlawed" Rhodesian refugees they are subject to arrest, imprisonment, or worse upon return to their country. Gore Vidal claims economic injury because Rhodesia has banned the sale of his book, *Myra Breckinridge,* in their country. All of these plaintiffs claim to be beneficiaries of the United Nations Security Council's mandatory economic sanctions lodged against Rhodesia. As previously outlined, these plaintiffs claim injury from the fact that the Congress of the United States chose to pass the "Byrd Amendment" in contravention of our treaty obligations, and permitted licenses to be given to two corporations for the importation of Rhodesian chromite.

Theoretically, these remaining plaintiffs have a stake in having the regime in Southern Rhodesia fall. Indeed, it may even be greater than the real desires of all civilized people to see racially oriented governments decline. Realistically, there is true adversity presented here, and the presentations of counsel have honed the issues. But there are further considerations to a determination on standing. It is appropriate for this Court to determine if there is a logical nexus between the status asserted by these plaintiffs, and the claim they seek adjudicated.

Exhibit A

The plaintiffs remaining here are hard pressed to show either "injury in fact" or a logical nexus between their injury and the actions of the United States Congress. The injury to these plaintiffs existed originally and completely due to the acts of a white minority in Southern Rhodesia. Neither the Congress nor the courts are able to absolve that original injury. The passage of the "Byrd Amendment" does not increase the pain or suffering felt by missionaries, refugees, travelers, or authors as originally inflicted. The Act merely reflects an attitude and priority change in the superstructure of Congress. Plaintiffs' alleged injury due to the possibility that the Act will prolong the existence of the present Rhodesian regime is tenuous at best. It merely is an adjunct to the already severe injury to world concepts caused by the Unilateral Declaration of Independence.

Plaintiffs' various injuries are not sufficiently related to congressional action to form that "logical nexus" between the status asserted by plaintiffs and the claim they seek to adjudicate.[13] The United States does not prevent any person from going to Rhodesia. Congress does not prevent the sale of books in Rhodesia. The United States licenses and provides passports for persons to sell books in, or travel to Rhodesia. The "Byrd Amendment" possesses no "logical nexus" to plaintiffs' injury.[14] There-

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[13] *Cf.* Flast v. Cohen, 392 U. S. 83 (1968); Association of Data Processing Service Organizations v. Camp, 397 U. S. 150 (1970).

[14] Rhodesia is the offensive party. The United Nations stated this through its sanctions to which we agreed. Congress has, however, lawfully rejected the concept of economic sanctions against Rhodesia. The reasons for the statute may not be as altruistic as those for the United Nations sanctions but they were strong enough to pass Congressional vote.

fore, it is held that none of the multitudinous plaintiffs named herein have the requisite status to bring this suit.[15]

This Court believes comment is necessary on other indicia for dismissal that are separate and apart from the issue of standing. Traditionally, courts do not entertain political questions even though such questions involve actual controversies. This policy is based on the doctrines of separation of powers and the policy of judicial self-restraint.

This case presents the type of issues that have previously been held not within the jurisdiction of courts. Generally, questions involving large matters of basic national policy in foreign affairs present no judicially cognizable issues and courts are not empowered to decide them. It is fundamental that the Congressional action challenged by the pleadings plainly fall in that area where the executive and legislative branches are supreme and final; reviewable only by the electorate, not by the courts.

> Such decisions are wholly confided by our Constitution to the political departments of the government. Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary had neither aptitude, facilities nor responsibility and which has

[15] This Court makes no consideration as to who would be able to satisfy the strictures of standing in this case.

> long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[16]

Judges are not ordained to review the political judgments of elected representatives of the people. The people are at the mercy of their elected representatives when decisions on foreign policy are made. The basis and important corollary is that elected representatives are subject to removal by the people, United States Judges are not.

> This elementary fact about the nature of our system which seems to have escaped notice occasionally must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire system of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, *even were we so bold as to assume that we can make better decisions on such issues.* (Emphasis added.)[17]

The same principles of judicial restraint are applicable in this case.

The circumstances here resound with political and foreign policy considerations. Congress partially renounced its treaty obligation with most of the world's nations when it passed the "Byrd Amendment." Congress has the Constitutional authority to abrogate, in whole or in

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[16] *Chicago & Southern Air Lines* v. *Waterman S. S. Co.*, 333 U. S. 103 (1948).

[17] *Pauling* v. *McNamara*, 331 F. 2d 796 (D. C. Cir. 1964).

part, the treaty obligations of the United States. Clearly, with reference to the legislative history of the "Byrd Amendment," Congress was legislating to permit the importation into this country of Rhodesian goods classified as strategic if these same goods were imported from a communist dominated country.[18] This was a political, economic, and foreign policy determination.[19] It is not for this Court to strike down an otherwise Constitutional statute upon the theory that it was motivated and passed for impermissible reasons.[20] The voters of our country are the only ones in this case who may judge the actions of their representatives. This Court, under the law, is without power to do so.

Motions of Defendants to Dismiss for Lack of Standing are granted, and Motion for Summary Judgment by Plaintiffs is hereby denied.

An appropriate Order shall be entered.

AUMBREY E. ROBINSON, JR.
Judge

June 19, 1972

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[18] S. Rep. No. 92-359, 92d Cong., 1st Sess., 1971.

[19] It remains uncontested that this country imports chromite from the United Soviet Socialist Republic. Therefore, the licenses granted under this law are valid as long as the goods are strategic. It is further uncontested that chromite is on the list of strategic goods. The statute does not require that a new determination of strategic need be made after the passage of this amendment. Indeed, it is questionable whether the goods need even be used for national defense or security purposes. The legislative history of the "Byrd Amendment" clearly outlines that it was general industrial need for reasonably priced chromite that precipitated the law, not national security.

[20] *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968); *Palmer* v. *Thompson*, 403 U. S. 217, 224-226 (1971).

Exhibit B

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1642

CHARLES COLES DIGGS, ET AL., APPELLANTS

v.

GEORGE P. SHULTZ, SECRETARY OF TREASURY, ET AL.

Appeal from the United States District Court
for the District of Columbia

Decided October 31, 1972

Mr. Morton Stavis, with whom *Mr. David Rein* was on the brief, for appellants.

Mr. Edward S. Christenbury, Attorney, Department of Justice with whom *Mr. Robert L. Keuch,* Attorney, Department of Justice, was on the brief, for appellee, Shultz.

Mr. James M. Johnstone, with whom *Mr. Thomas C. Arthur* was on the brief, for appellee, Union Carbide Corporation.

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge* and MCGOWAN, *Circuit Judge.*

Exhibit B

McGowan, *Circuit Judge*: This is an appeal from the dismissal by the District Court of a complaint seeking declaratory and injunctive relief in respect of the importation of metallurgical chromite from Southern Rhodesia. The gravamen of this action was an asserted conflict between (1) the official authorization of such importation by the United States, and (2) the treaty obligations of the United States under the United Nations Charter. Plaintiff-appellants sought summary judgment, as did defendant-appellees alternatively to a motion to dismiss for failure to state a claim upon which relief could be given.

The District Court's ruling for appellees was grounded primarily upon lack of standing, but it encompassed as well a concept of the nonjusticiability of the issues raised. Although we believe there was standing upon the part of at least some of the appellants to pursue their cause of action judicially, we think that cause is not one in respect of which relief can be granted. Accordingly, we affirm the judgment of dismissal.

I

In 1966 the Security Council of the United Nations, with the affirmative vote of the United States, adopted Resolution 232 directing that all member states impose an embargo on trade with Southern Rhodesia—a step which was reaffirmed and enlarged in 1968. In compliance with this resolution, the President of the United States issued Executive Orders 11322 and 11419, 22 U.S.C. § 287c, establishing criminal sanctions for violation of the embargo. In 1971, however, Congress adopted the so-called Byrd Amendment to the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. § 98-98h, which provides in part:

> Sec. 10. Notwithstanding any other provision of law . . . the President may not prohibit or regulate the importation into the United States of any material

Exhibit B

> determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area . . . for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law.

Since Southern Rhodesia is not a Communist-controlled country, and inasmuch as the United States imports from Communist countries substantial quantities of metallurgical chromite and other materials available from Rhodesia, the Byrd Amendment contemplated the resumption of trade by this country with Southern Rhodesia. By direction of the President, the Office of Foreign Assets Control issued to the corporate appellees in this case a General License authorizing the importation of various materials from Southern Rhodesia, and they began importation.

Alleging that the Byrd Amendment did not and could not authorize issuance of such a license contrary to this country's treaty obligations, appellants sought to enjoin further importation, to require official seizure, and to restrain use, of materials already imported under the General License, and to declare the General License null and void.

II

The question of standing turns first on whether the party seeking relief has alleged a sufficient personal interest in the controversy to insure concrete adverseness in the presentation of the issues. *Data Processing Service v. Camp,* 397 U.S. 150, 152 (1969); *Baker v. Carr,* 369 U.S. 186, 204 (1962). Appellants allege various personal injuries, and we agree with the District Court that these

allegations amply provide the injury in fact element of the standing requirement.[1]

Another requirement of standing is that the complainant be within the zone of interests sought to be protected by the law in question. *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1969). United Nations Security Council Resolution 232 was—and is—an attempt by means of concerted international pressure to turn the Rhodesian Government away from the course of action which has resulted in the adverse circumstances experienced by appellants. They are unquestionably within the reach of its purpose and among its intended beneficiaries.

Finally, the concept of standing has been characterized as contemplating that there be a "logical nexus between the status asserted and the claim sought to be adjudicated," in order to insure that the litigant is the proper party to represent the interests involved. *Flast v. Cohen*, 392 U.S. 83, 102 (1967).[2] The District Court found the causal rela-

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[1] We adopt the District Court's identification of those plaintiffs who meet the injury in fact requirement. Appellants M'Gabe and Zimbabive complain they are unable to return to their homeland, Rhodesia. Appellants Diggs, Conyers, Rangel, Stokes and Franck all alleged that they have been refused entry into Rhodesia; and the American Committee on Africa complains that its chairman has also been denied entry. The Council for Christian Social Action of the United Church of Christ alleges its missionaries have been arrested and deported from Rhodesia. Appellant Vidal asserts injury because sale of one of his books is banned in Rhodesia. None of the other plaintiffs have standing; and it is not contended in this court that they have.

[2] It is far from clear that this formulation adds anything of substance to the two requirements just discussed. It states a proposition that can well be thought to be related to the merits of a claim rather than to the existence of standing to press it. The District Court, with some support in Supreme

tionship of appellants' claims to the challenged actions too attenuated to constitute such a nexus. That finding rested largely on the conclusion that appellants' quarrel was really with the Rhodesian Government rather than with appellees. But that view fails to focus on the exact nature of the grievance appearing in the complaint.

Appellants, along with many other persons, have suffered, and continue to suffer, tangible injuries at the hands of Southern Rhodesia. In an attempt to terminate the policies giving rise to those wrongs, the United Nations, with the United States as an assenting member, established the embargo. The precise injury of which appellants complain in this law suit is allegedly illegal present action *by the United States* which tends to limit the effectiveness of the embargo and thereby to deprive appellants of its potential benefits. That quarrel is directly and immediately with this government, and not with Southern Rhodesia.

Appellees suggest that the prospects of significant relief by means of the embargo are so slight that this relationship of intended benefit is too tenuous to support standing. But this strikes us as tantamount to saying that because the performance of the United Nations is not always equal to its promise, the commitments of a member may be disregarded without having to respond in court to a charge of treaty violation. It may be that the particular economic sanctions invoked against Southern Rhodesia in this instance will fall short of their goal, and that appellants will ultimately reap no benefit from them. But, to persons situated as are appellants, United Nations action constitutes the only hope; and they are personally aggrieved and injured by the dereliction of any member state which weakens the

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Court language, chose to pursue the question as an aspect of standing, although the rationale followed by it is relevant to its dismissal for failure to state a claim warranting relief.

capacity of the world organization to make its policies meaningful.

Of course it is true that appellants' plight stems initially from acts done by Southern Rhodesia, and that their primary quarrel is with it. But this does not foreclose the existence of a judicially cognizable dispute between appellants, on the one hand, and appellees, on the other, who are said to be acting in derogation of the solemn treaty obligation of the United States to adhere to the embargo for so long as it is in being.[3]

III

The District Court, in its comments to the effect that non-justiciability would necessitate dismissal of the complaint even if standing be found, reasoned as follows: It is settled constitutional doctrine that Congress may nullify, in whole or in part, a treaty commitment. Congress, by the Byrd Amendment in 1971, acted to abrogate one aspect of our treaty obligations under the U.N. Charter, that is to say, our continued participation in the economic sanctions taken against Southern Rhodesia. The considerations underlying that step by Congress present issues of political policy which courts do not inquire into. Thus, appellants' quarrel is with Congress, and it is a cause which can be pursued only at the polls and not in the courts.

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[3] The passage of the Byrd Amendment was the subject of widespread notice and comment within the United Nations, resulting in the reaffirmation by the Security Council on February 8, 1972 of the sanctions against Southern Rhodesia. The resolution to this end declared that any legislation passed by any member state "with a view to permitting, directly or indirectly, the importation from Southern Rhodesia of any commodity falling within the scope of the obligations imposed (by the 1968 resolution), including chrome ore, would undermine sanctions and would be contrary to the obligations of States."

Exhibit B

In this court appellants do not seriously contest the first of these propositions, namely, the constitutional power of Congress to set treaty obligations at naught.[4] They seek, rather, to show that, in the Byrd Amendment, Congress did not really intend to compel the Executive to end United States observance of the Security Council's sanctions, and that, therefore, it is the Executive which is, without the essential shield of Congressional dispensation, violating a treaty engagement of this country. Appellants point out in this regard that the Byrd Amendment does not in terms require importation from Southern Rhodesia, but leaves open two alternative courses of action. The statute says the President may not ban importation from Rhodesia of materials classified as critical and strategic unless importation from Communist countries is also prohibited. Instead of permitting resumption of trade with Rhodesia, the President, so it is said, could (1) have banned importation of these materials from Communist nations as well as from Rhodesia, or (2) have taken steps to have these materials declassified, thereby taking them in either case out of the scope of the Byrd Amendment.

Citing the canon of construction that a statute should, if possible, be construed in a manner consistent with treaty

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[4] Moser v. United States, 341 U.S. 41, 45 (1951); Clark v. Allen, 331 U.S. 503, 508-9 (1947); Pigeon River Co. v. Cox, 291 U.S. 138, 160 (1934); Edge v. Robertson, 112 U.S. 580, 597 (1884).

Although appellants concede that Congress has the power to override treaty obligations (Appellants' Br. at 23), they contend that our commitment to the U.N. has more force than an ordinary treaty. Appellants argue on the basis of their interpretation of the U.N. Charter that Congress could override Resolution 232 only by withdrawing from the U.N. entirely. There is, however, no evidence that this country's membership in that organization was intended to be on the all-or-nothing basis suggested by appellants.

obligations, appellants argue that the Byrd Amendment, although discretionary on its face, should be construed to compel the President to take one or the other of these two steps as a means of escape from the necessity of breaching the U.N. Charter. But these alternatives raise questions of foreign policy and national defense as sensitive as those involved in the decision to honor or abrogate our treaty obligations.[5] To attempt to decide whether the President chose properly among the three alternatives confronting him "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Frothingham v. Mellon*, 262 U.S. 447, 489 (1923).

We think that there can be no blinking the purpose and effect of the Byrd Amendment. It was to detach this country from the U.N. boycott of Southern Rhodesia in blatant

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[5] Russia supplied 60 per cent of our metallurgical chromite in 1970 while the embargo was being observed by the United States, S. Rep. No. 92-359, 92d Cong., 1st Sess., 121 (1971), and a decision to discontinue importation would be a serious step in a very delicate area. Similarly, the decision to remove certain materials from the critical and strategic list should be done in a manner consistent with the objectives of that act. 50 U.S.C. § 98. Appellants' view would require reclassification of materials without regard to whether they continue to be critical to national defense. Appellants argue that the apparent surplus in the stockpile indicates the materials are no longer critical. This confuses two distinct functions under the act. One is classification of materials as strategic or critical in order to encourage their development in this country and to avoid dangerous dependency upon other nations. The other is the acquisition of certain quantities of these materials to be stockpiled for use in an emergency. A surplus in the stock pile at a given moment does not mean that it is no longer necessary to be concerned about the dependency of this country on outside sources for the materials in question.

disregard of our treaty undertakings. The legislative record shows that no member of Congress voting on the measure was under any doubt about what was involved then; and no amount of statutory interpretation now can make the Byrd Amendment other than what it was as presented to the Congress, namely, a measure which would make—and was intended to make—the United States a certain treaty violator. The so-called options given to the President are, in reality, not options at all. In any event, they are in neither case alternatives which are appropriately to be forced upon him by a court.[6]

Under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it. We consider that this is precisely what Congress has done in this case; and therefore the District Court was correct to the extent that it found the complaint to state no tenable claim in law.

Affirmed.

WILBUR K. MILLER, *Senior Circuit Judge,* concurs in the result.

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[6] The Supreme Court in *Baker v. Carr* was at pains to point out that the so-called "political question doctrine" is an aspect of the separation of powers prescribed by the Federal Constitution; and that, in the intra-federal context, it continues to have meaningful vitality to restrain interference by one branch of the federal establishment with concerns committed to another. The case before us is a classic one for the careful appraisal by a court of the consequences of an exercise of jurisdiction it may technically be thought to have.

Exhibit C

Order of the United States Court of Appeals for the District of Columbia Circuit

No. 72-1642

CHARLES COLES DIGGS, *et al.*,

Appellants,

v.

GEORGE P. SHULTZ, Secretary of Treasury, *et al.*,

Appeal from the United States District Court for the District of Columbia

Before BAZELON, Chief Judge
WILBUR K. MILLER, Senior Circuit Judge and
McGOWAN, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel.

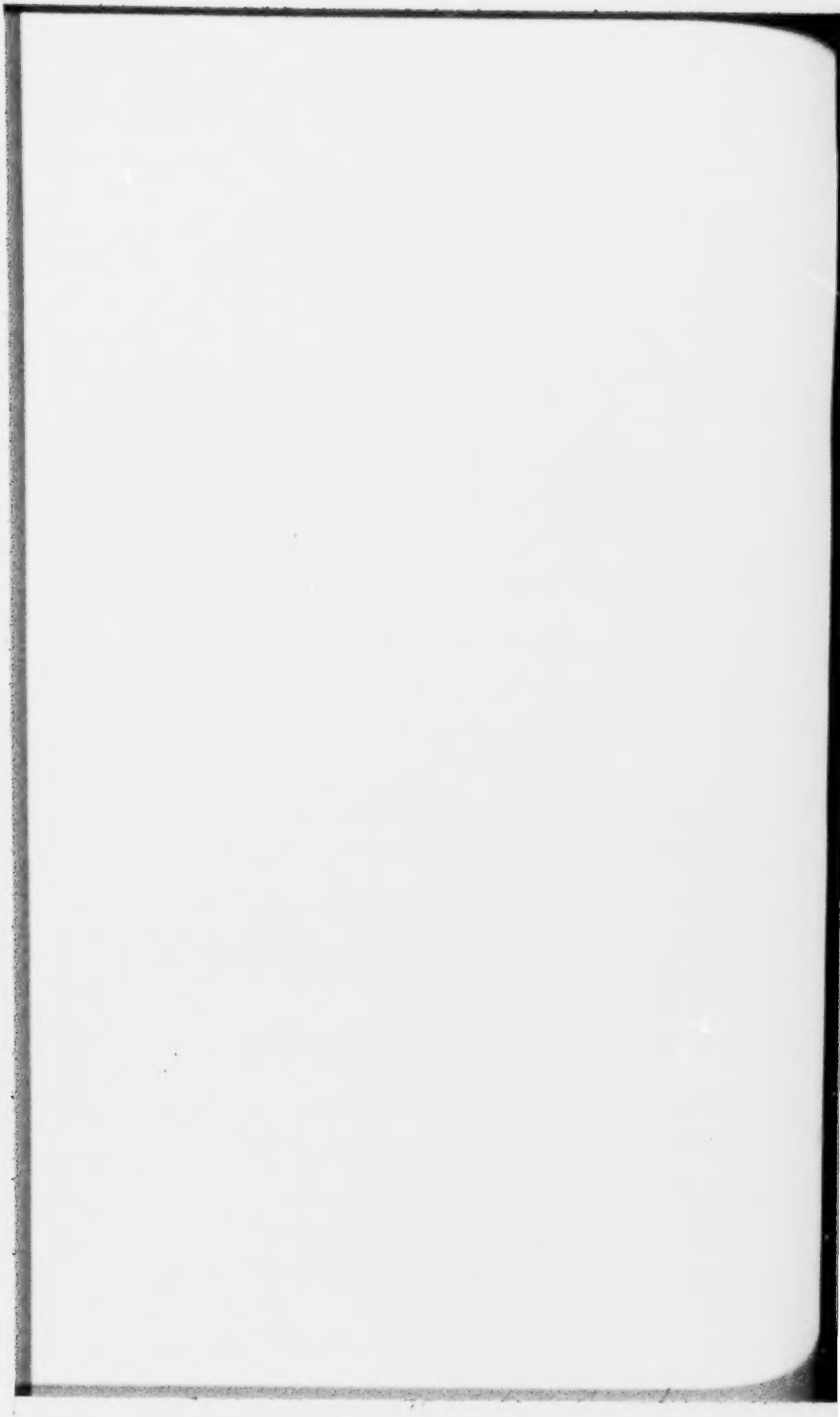
On consideration thereof it was ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam for the Court Hugh E. Klein.

Dated October 31, 1972.

Opinion by Circuit Judge McGOWAN

Senior Circuit Judge MILLER concurs in the result.



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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1007

CHARLES COLLIS DUKE, JR., ET AL., *Petitioners*,

v.

GEORGE P. SHULTZ, Secretary of the Treasury, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT UNION CARBIDE IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1037

CHARLES COLES DIGGS, JR., ET AL., *Petitioners,*

v.

GEORGE P. SHULTZ, Secretary of the Treasury, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT UNION CARBIDE IN OPPOSITION

OPINIONS BELOW

The decisions of the Court of Appeals and the District Court have not been reported, but are reprinted at Pet. 47a-55a and Pet. 34a-46a, respectively.

QUESTION PRESENTED

Despite petitioners' efforts to involve this Court in issues of national security and international relations which were conclusively resolved by the Congress and the President under the Byrd Amendment, the only legal questions presented were completely disposed of by the Court of Appeals in accordance with well settled

precedents. Stripped of petitioners' political coloration, the questions presented are:

(1) Where Congress in the Byrd Amendment, after a thorough review of all possible consequences, specifically including inconsistency with preexisting treaty obligations, expressly mandated the importation of metallurgical chromite and other "strategic and critical" materials from Rhodesia (except under circumstances which admittedly do not exist), may the courts set aside the Congressional mandate on the basis of alleged inconsistency with the obligations of a treaty predating the legislation?

(2) Where, by virtue of unchallenged and unchallengeable national security and foreign policy determinations by the Executive, the circumstances which, under the Byrd Amendment, would permit a ban on the importation of metallurgical chromite and other "strategic and critical" materials from Rhodesia do not exist, may the court revise such Executive decisions in order to avoid alleged conflicts between the Congressional mandate and the obligations of a preexisting treaty?

COUNTERSTATEMENT OF THE CASE

This case arises out of the continuing political controversy over the "Byrd Amendment," which was passed by Congress to end this nation's dependency upon the Soviet Union for metallurgical chromite by permitting the importation of that and other "strategic and critical" materials from Rhodesia, despite contrary resolutions of the United Nations Security Council.

Specifically, the Amendment, Section 503 of the Military Procurement Act of 1971, Pub. L. No. 92-156,

sought to remove chrome ore and other materials classified as "strategic and critical" under the provisions of the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98-98h, from the embargo placed upon Rhodesian imports by Executive Orders 11322 (Jan. 5, 1967) and 11419 (July 29, 1968). These orders had been issued by President Johnson under Section 5 of the United Nations Participation Act, 22 U.S.C. § 287c, in order to establish legally in this country the embargo of Rhodesian products voted by the Security Council in Resolutions 232 (Dec. 16, 1966) and 253 (May 29, 1968).[1]

The result of this embargo was to make the Soviet Union, the major world supplier after Rhodesia of metallurgical chromite, this country's main source of this "strategic and critical" material, which is not produced in the United States.

As is shown in greater detail in Addendum A, Senator Harry F. Byrd, Jr. of Virginia, concerned that this country must rely upon the Soviet Union for this critical defense-related material, introduced the legislation "to end this dependency [for chrome] upon the Soviet Union," the Security Council resolutions not-

[1] The Executive Orders delegated primary authority for implementation of the embargo to the Treasury Department, which issued regulations forbidding importation of Rhodesian materials without a license. Rhodesian Transaction Regulations, 31 C.F.R. Part 525 (1967). These were replaced in 1968 with the Rhodesian Sanctions Regulations, 31 C.F.R. Part 530, which continue in effect to the extent they do not conflict with the Byrd Amendment. Under the Regulations the Secretary of the Treasury delegated his authority under the Executive Orders to the Director of the Office of Foreign Assets Control. 31 C.F.R. § 530.807. The "General License" permitting imports of "strategic and critical" materials was an amendment to the Rhodesian Sanctions Regulations. 31 C.F.R. § 503.518.

withstanding. Senator Byrd explained that under his bill "the President could not ban imports of a strategic material from a free world country if the importation of the same material is permitted from a Communist-dominated country." 117 Cong. Rec. S 3994 (Mar. 29, 1971), Addendum A at 2a, 4a.

Opposition to the measure formed quickly, as others weighed the competing interests differently. In hearings on the bill, these opponents vigorously argued that it should be rejected, since, as Senator Byrd stated, its major purpose was to modify the Executive Orders in order to permit imports of metallurgical chromite from Rhodesia, in spite of the Security Council resolutions. *See, e.g., U.S. Sanctions Against Rhodesia—Chrome, Hearings on S. 1404 Before the Senate Committee on Foreign Relations,* 92d Cong., 1st Sess. at 2, 7-8, 14-15, 20, 77-78, 103-104; Addendum A at 5a-9a. After hearings, the Foreign Relations Committee did not report the bill out. However, the Armed Services Committee added provisions identical to the bill as Section 503 of H.R. 8687, the 1971 bill for military procurement. Addendum A at 9a.

Vigorous attempts to delete or weaken Section 503, supported by opponents' assertions that it was "specifically designed to have the United States unilaterally break the United Nations embargo against Rhodesia and to import chrome ore from that area" (Senator McGee), failed by narrow votes (Addendum A at 10a-13a), and the Senate-House conferees approved it virtually intact.[2] Addendum A at 15a.

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[2] In deference to the House germaneness rule, Pub. L. No. 92-510, § 126, the conferees entitled Section 503 as an amendment to the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98-98h, a defense-related law, instead of the U.N. Participation Act. Addendum A at 15a.

Considering the Conference Committee's work, the House approved Section 503 on November 10, 1971 by a separate roll call vote of 251 to 100, despite petitioner Congressman Dellums' statement that the Byrd Amendment "would end the embargo on Rhodesian chrome." The Senate approved the Conference Report the next day on a 65-19 vote, the President signed the bill November 17, 1971, and by its terms the Byrd Amendment became effective on January 1, 1972. Addendum A at 19a-22a.

As enacted the Byrd Amendment reads:

> "SEC. 10. Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. 1202), for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law." Pub. L. No. 92-156, § 503.

On January 24, 1973 respondent Sommerfield, after being "informed by [his] superiors of instructions sent by the President to the Secretary of the Treasury directing the Treasury Department to take the necessary action to permit the importation of strategic and critical materials of Rhodesian origin, as called for by the Byrd Amendment" (Sommerfield Affidavit ¶2, reprinted *infra* at 23a as Appendix B), issued as an amendment to the Rhodesian Sanctions Regulations the

"General License" challenged by petitioners. 31 C.F.R. § 530.518, Pet. 27a-29a.

Following the issuance of the "General License" and the importation of chromite by respondent Union Carbide and by Foote Mineral Company, petitioners filed this case on April 19, 1972.

Petitioners sought an injunction forbidding the importation into this country of metallurgical chromite and other "strategic and critical" materials from Rhodesia (Amended Cplt. ¶ 1(a)), as well as an order directing the Government defendants to impound the metallurgical chromite already imported by private parties in reliance upon the Byrd Amendment (Amended Cplt. ¶ 1(b)), and a declaratory judgment that the statute did not authorize imports from Rhodesia, or that, if it did, it "is itself null and void." Amended Cplt. ¶ 1(c).

After denying petitioners' motions for a temporary restraining order and a preliminary injunction, the District Court issued an opinion granting respondents' motions to dismiss on June 19, 1972. The District Court held that the case was not justiciable since it presented political questions which, in any event, petitioners lacked standing to raise. Pet. 37a, 44a. The court also found that petitioners' complaint failed to state a claim upon which relief could be granted, since Congress in passing the Byrd Amendment exercised its "Constitutional authority to abrogate, in whole or in part," any treaty obligations that might prevent "the importation into this country of Rhodesian goods classified as strategic if these same goods were imported from a communist dominated country." Pet. 45a-46a.

The Court of Appeals unanimously upheld Judge Robinson's order dismissing the case. It agreed the

case was not justiciable, although it found that some petitioners had "standing" in a formal sense. Pet. 50a, n. 1. Holding that "there can be no blinking the purpose and effect of the Byrd Amendment" to undercut United States adherence to the "U.N. boycott of Southern Rhodesia," the Court of Appeals saw no basis to void the legislation or interpret it contrary to its manifest intent. Pet. 53a-55a.

Nor was the Court impressed by petitioners' claim that since the President *could* continue the Rhodesian embargo in full force by two suggested alternatives, one of which was banning chrome imports from all Communist countries, including the Soviet Union, he was *required* to do so. Its opinion stated:

> "The so-called options given to the President are, in reality, not options at all. In any event, they are in neither case alternatives which are appropriately to be forced upon him by a court." Pet. 55a (footnote omitted).

The political controversy surrounding the Byrd Amendment has continued during the pendency of this litigation, with both the House and the Senate rejecting proposals to repeal or weaken it. 118 Cong. Rec. S 8613 (May 31, 1972), H 7508-14 (Aug. 10, 1972).

ARGUMENT IN OPPOSITION TO CERTIORARI

The Byrd Amendment to the Strategic and Critical Materials Stock Piling Act flatly provides that "the President *may not prohibit or regulate* the *importation* into the United States of *any material determined to be strategic and critical* . . . if such material is the *product of any foreign country or area not listed as a Communist-dominated country* or area . . . for *so long as the importation into the United States of material*

of that kind which is the *product of such Communist-dominated countries* or areas is *not prohibited by any provision of law"* (emphasis added).

It is undisputed that metallurgical chromite is designated a strategic and critical material under the Strategic and Critical Materials Act. It is equally undisputed that importation of chrome from Communist-dominated countries, since not prohibited by law, continues. Finally, no one disputes that Rhodesia is not listed as a Communist-dominated country or area.

Given these facts, both courts below recognized that the Byrd Amendment expressly prohibits Presidential interference with importation of metallurgical chromite and other "strategic and critical" materials from Rhodesia and fully supports issuance of the so-called "General License" permitting such importation.

Petitioners' attacks upon the implementation of the Byrd Amendment are founded totally upon alleged conflict between the express Congressional mandate and preexisting obligations incurred by the United States under the United Nations charter. Petitioners contend that these obligations permit the courts either:

(a) to enjoin implementation of the Congressional will; or

(b) to create the preconditions for a ban on Rhodesian chrome imports by reversing the Executive Branch's determination that chrome is a "strategic and critical" material, under the Strategic and Critical Materials Act, or by forcing the President to bar importation of chrome from Communist-dominated countries, under the Trading with the Enemy Act.

ADDENDA

The courts below correctly disposed of these claims in accordance with well settled precedents presenting no substantial question for this court. Thus, as we shall show:

(1) since Congress, acting under its conceded authority, clearly legislated to permit the importation of metallurgical chromite and other "strategic and critical" materials from Rhodesia, the importation of chromite challenged here presents no substantial question of law warranting decision by this Court; and

(2) moreover, the Court of Appeals correctly held that the Judiciary should not intrude into the intricate and important foreign policy decisions made by the Executive in connection with the Byrd Amendment.

I. Since Congress, Acting Under Its Conceded Authority, Clearly Legislated To Permit the Importation of Metallurgical Chromite and Other "Strategic and Critical" Materials from Rhodesia, the Importation of Chromite Challenged Here Presents No Substantial Question of Law Warranting Decision by this Court.

This Court's decisions clearly establish the constitutional power of Congress to enact legislation superseding the inconsistent provisions of prior treaties. *Moser* v. *United States,* 341 U.S. 41, 45 (1951); *Clark* v. *Allen,* 331 U.S. 503, 508-09 (1947); *Pigeon River Co.* v. *Cox,* 291 U.S. 138, 160 (1934); *Stephens* v. *Cherokee Nation,* 174 U.S. 445, 483-84 (1899); *Whitney* v. *Robertson,* 124 U.S. 190, 194 (1888); *Edye* v. *Robertson (Head Money Cases),* 112 U.S. 580, 597-99 (1884). In short, treaties are "placed upon the same footing, and made of like obligation, with an act of legislation... and *no superior efficacy is given to either over the*

other." *Whitney* v. *Robertson,* 124 U.S. 190, 194 (1888) (emphasis added).

Viewed in light of this principle, the case becomes a routine and simple exercise in statutory construction, with the Congressional purpose so clear that no substantial question is presented, let alone one warranting review by this Court.

First, the United Nations Charter—the treaty involved here—has no greater legal effect on subsequent legislation than any other treaty. The history of the ratification of the Charter establishes, as Senator Lucas stated at the time, that the Senate believed it was "in the midst of the ratification of a treaty according to the Constitutional requirement of a two-thirds vote. Certainly no one will disagree that this is a treaty. No one is proceeding upon any other theory." 91 Cong. Rec. 8021 (1945). Thus, as was stated more bluntly by Senator Connally, Chairman of the Foreign Relations Committee, during the debate on ratification, "we always have the power to violate a treaty if we want to violate it." 91 Cong. Rec. 7987 (1945).

Second, the Byrd Amendment on its face clearly forbids an embargo on "strategic and critical" materials from Rhodesia, or any other non-Communist country, so long as the same materials may be imported from any Communist country. The statutory language simply forbids full adherence to the United Nations Rhodesian Sanctions and mandates the Executive to permit imports of metallurgical chromite and other "strategic and critical" materials from Rhodesia, unless it takes affirmative actions which admittedly have not been taken.

The legislative history confirms this literal reading of the statute, and shows that Congress considered but rejected the argument that the United Nations Charter should override the nation's need for Rhodesian chromite. Addendum A demonstrates that throughout the legislative process, both the Amendment's supporters and its opponents admitted, in the words of petitioner Congressman Diggs, that it would "permit the importation of Rhodesian chrome contrary to U.N. sanctions against Southern Rhodesia...." 117 Cong. Rec. E 10235 (Sept. 29, 1971). And as this Court has stated, "[i]t is not for us to so construe the Acts as to frustrate [the] clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption." *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

Nor did the Executive have trouble understanding the clear intent of Congress that unless certain preconditions were met, it could no longer forbid the importation of Rhodesian chromite. Sommerfield Affidavit ¶ 2, Addendum B at 23a; 31 C.F.R. § 530.518 ("General License"). Indeed, the petitioners' contention that the Byrd Amendment left the President with the "option" of continuing the embargo by banning imports from all Communist countries, including the Soviet Union (Pet. 19), is an admission that the Executive's reading of the statute was correct, despite petitioners' disappointment that the President did not choose the "option" they prefer.

Finally, the action of both Houses of Congress in defeating attempts to repeal or modify the Byrd Amendment after the Executive interpreted the statute in its "General License" indicates that it approved that reading of the statutory language. *Cf. Flood* v.

Kuhn, 407 U.S. 258, 283-84 (1972), *Toolson* v. *New York Yankees,* 346 U.S. 356, 357 (1953).

In sum, the Byrd Amendment clearly was intended to and did end the embargo on importation of Rhodesian chromite and other "strategic and critical" materials pursuant to the authority of Congress to regulate foreign commerce, and to enact legislation inconsistent with prior treaties. Thus, the supposed "questions of the allocation of power to abrogate or breach obligations of the United States to the United Nations" asserted by petitioners (Pet. 18), or the canon of statutory construction that courts will, *when in doubt,* construe an unclear statute in order to preserve provisions of a prior treaty, are simply not presented by this case.

II. Moreover, the Court of Appeals Correctly Held that the Judiciary Should Not Intrude into the Intricate and Important Foreign Policy Decisions Made by the Executive in Connection with the Byrd Amendment.

As shown above, since metallurgical chromite is classified as a "strategic and critical" material, and its importation from the Soviet Union and other communist countries is not banned, the Byrd Amendment requires the President to permit its importation from Rhodesia.

Confronted by this manifest meaning of the statutory language, petitioners do not seriously press before this Court their five tortured readings of the statute summarily rejected by the Courts below. Instead, they maintain that this Court should order the President to exercise "options left to him under the legislation which would not have involved a breach of treaty." Pet. 19.

The Court of Appeals expressly rejected two of these "options," *i.e.*, banning imports from all Communist countries, including the Soviet Union, and arbitrarily and unlawfully removing chromite from the list of "strategic and critical" materials. As the Court of Appeals recognized, the "so-called options given to the President are, in reality, not options at all. In any event, they are in neither case alternatives which are appropriately to be forced upon him by a court." Pet. 55a.[3]

For as the Court of Appeals realized, "these alternatives raise questions of foreign policy and national defense as sensitive as those involved in the decision to honor or abrogate our treaty obligations." Pet. 54a.

The Court of Appeals was obviously correct. There is no legal basis presented here for a court to order the Executive Branch to remove metallurgical chromite from the list of materials classified as "strategic and

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[3] Petitioners here suggest two additional "options" (Pet. 19, fn):

First, they suggest the President could have adopted one of the five strained constructions of the statute offered by petitioners in their complaint. But none of these readings of the statutory language even received serious consideration by either court below, so strongly does the statutory language and legislative history negate them.

Second, petitioners suggest that this country petition the Security Council under Article 50 of the U.N. Charter for consideration of "special economic problems" arising out of continued adherence to the Rhodesian embargo. But the same reasons arguing against judicial review of the President's refusal to ban chromite imports from the Soviet Union (*see infra* at 14-15) apply equally to this "option." No United States domestic court should presume to direct the President to undertake such a course of action. Moreover, any suggestion that such a course must be taken before complying with domestic legislation assumes that the U.N. Charter has some kind of "super-Constitutional" force, which it does not.

critical" under the provisions of the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98-98h.[4]

Nor should any court breach the separation of powers doctrine by ordering the President to forbid chromite imports from the Soviet Union.[5] This Court has often held that the Judiciary should not interfere with the President's broad Constitutional authority over delicate questions of foreign policy. *See, e.g., Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 ("the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the gov-

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[4] As the Court of Appeals recognized, the

> "decision to remove certain materials from the critical and strategic list should be done in a manner consistent with the objectives of that act. 50 U.S.C. § 98. Appellants' view would require reclassification of materials without regard to whether they continue to be critical to national defense. Appellants argue that the apparent surplus in the stockpile indicates the materials are no longer critical. This confuses two distinct functions under the act. One is classification of materials as strategic or critical in order to encourage their development in this country and to avoid dangerous dependency upon other nations. The other is the acquisition of certain quantities of these materials to be stockpiled for use in an emergency. A surplus in the stock pile at a given moment does not mean that it is no longer necessary to be concerned about the dependency of this country on outside sources for the materials in question." Pet. 54a, n. 5.

[5] Prior to the direction to respondent Sommerfield to issue the "General License," Administration officials were quoted in the press as indicating that the President considered "the feasibility of effectively continuing the ban [on Rhodesian chromite] by blocking imports from the Soviet Union and other Communist countries." The New York Times, Nov. 18, 1971, p. 13, col. 1. Apparently the President rejected this alternative.

ernment"); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (referring to "the very delicate, plenary and *exclusive* power of the President as the *sole organ* of the Federal government in the field of international relations") (emphasis added).

Particularly pertinent here, courts have uniformly refused to review Presidential orders under the Trading with the Enemy Act, 50 U.S.C. App. § 5, the only statutory provision under which the President could ban Communist imports as petitioners propose. *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106, 109 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966) ("courts will not review a determination so peculiarly within the province of the chief executive"); *Nielsen* v. *Secretary of Treasury*, 424 F.2d 833, 839 (D.C. Cir. 1970); *Welch* v. *Kennedy*, 319 F.Supp. 945, 948 (D.D.C. 1970).

Thus, so long as the Congress agrees with the President's exercise of the foreign commerce powers it has delegated to him, as limited by the Byrd Amendment, the Judicial Branch of the Government should not interfere. *United States* v. *Curtiss-Wright Export Corp., supra; Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision").

The decision of the Court of Appeals not to inquire into the President's exercise of his foreign policy and national defense powers was manifestly correct.

CONCLUSION

As we have shown, the decision of the Court of Appeals is clearly correct. The Congress, pursuant to its manifest authority, clearly intended to and did legislate to permit the importation of Rhodesian metallurgical chromite and other "strategical and critical materials," and the President has exercised his discretion within the limits set by law.

Realistically viewed, this case is simply an attempt by petitioners to raise in a judicial forum factual and policy issues which Congress decided against them in passing the Byrd Amendment and rejecting later attempts to repeal or modify it.

As a result, the petition for certiorari presents no important question of law to this Court, and should therefore be denied.

Respectfully submitted,

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ADDENDUM A

LEGISLATIVE HISTORY OF THE BYRD AMENDMENT

The provision which ultimately became the "Byrd Amendment" to the Military Procurement Act of 1971 was originally introduced in the Senate by Senator Byrd on March 29, 1971, as S.1404.[1] As originally introduced, the bill read as follows:

> "A BILL TO amend the United Nations Participation Act of 1945 to prevent the imposition thereunder of any prohibition on the importation into the United States of any strategic and critical material from any free world country for so long as the importation of like material from any Communist country is not prohibited by law
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(a)) is

[1] Identical legislation was introduced in the House by Representative Collins of Texas as H.R. 5445. In describing his bill, Congressman Collins stated that "it impartially states that if we buy a strategic critical material from *any* Communist country, that we should also be entitled to import critical material from any free country in the world." He further stated that "*chromium is on America's list of vital strategic raw materials*" and made clear that one of the objectives of his bill was that "the United States would again have adequate chromium ore and would no longer be faced with a critical raw material shortage that is so important to our national defense." *Economic Sanctions Against Rhodesia, Hearings on H.R.J. Res. 172, H.R. Con. Res. 5, 6, 12, H.R. Res. 45 and H.R. 5445 Before the Subcommittee on International Organizations and Movements of the House Committee on Foreign Affairs,* 92d Cong., 1st Sess. 44-46 (1971) [hereinafter cited as "*House Hearings*"]. Unless otherwise indicated, all emphasis herein is supplied.

amended by adding at the end thereof the following new sentence: "On or after the effective date of this sentence, the President may not prohibit or regulate the importation into the United States pursuant to this section of any material determined to be strategic and critical pursuant to section 2 of the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98a), which is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. 1202), for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law." 117 Cong. Rec. S 3995 (Mar. 29, 1971).

A. *Statement of Sponsor*

In introducing the bill, Senator Byrd stated:

"Mr. President, I am today introducing legislation aimed at ending the dependence of the United States upon the Soviet Union for its supply of chrome ore—a material vital to national defense.

"The United States is now facing a critical shortage of chrome, which is essential to the manufacture of stainless steel. Jet aircraft and missiles are among the items vital to defense which make use of chrome.

"Our current situation is the result of American participation in United Nations economic sanctions against Rhodesia, the small African country which is the world's richest source of chrome.

"The U.N. sanctions were imposed after Rhodesia declared her independence from Great Britain. Rhodesia was labeled a 'threat to international peace and security'—a ridiculous charge.

"Unfortunately, the United States actively supported the embargo against Rhodesia. Since the first sanctions in 1966, the United Nations has twice tried to strangle Rhodesia with an even tighter boycott, each time actively supported by the United States.

"These measures have not worked. *The embargo policy is a failure. Rhodesian trade actually is increasing.*

"Yet the United States persists in supporting the unethical U.N. sanctions, even though all Rhodesia has done is to declare her independence from Great Britain —a step the American colonies took in 1776.

"It is today a criminal offense for any American to engage in trade with Rhodesia.

"Now this situation would be bad enough if it were just a question of international law and relations between nations. Former Secretary of State Dean Acheson has called the U.N. action against Rhodesia 'barefaced aggression, unprovoked and unjustified by a single legal or moral principle.'

"I concur.

"But more than legal and moral principle is involved.

"Before the U.N. sanctions were imposed, Rhodesia supplied the United States with most of its chrome ore.

"With the embargo in effect, the United States has had to turn to the Soviet Union for chrome. Sixty percent of the chrome we are using comes from Russia.

"*The Russians have taken advantage of a monopoly situation and have more than doubled the price of the chrome ore they export to the United States.*

"But even more serious is the fact that we are dependent on the favor of the Russians for a strategic material.

"The administration has requested that Congress pass a bill permitting withdrawal of 30 percent of the present supply of chrome in the Nation's reserve stockpile.

"This would temporarily meet our needs, in combination with Russian chrome. But it is only a stopgap measure, for at this rate we would exhaust our stockpile in a little over 3 years.

"To my mind, it is totally illogical for the United States to depend upon Russia for a strategically important commodity.

"*The legislation I am introducing today would enable us to end this dependency upon the Soviet Union.*

"*Under my proposal, the President could not ban imports of a strategic material from a free world country if the importation of the same material is permitted from a Communist-dominated country.* That seems logical to me.

"Now technically, the administration could meet the requirements of this legislation by banning all chrome imports. But then of course there would be far too little ore for even the most elementary needs of the United States.

"Therefore, the United States would have to end its participation in the U.N. sanctions against Rhodesia, insofar as chrome is concerned.

"It would be my hope that the administration would drop all sanctions against Rhodesia. That would be the proper course to take.

"But even if this course were not taken, at least the United States would end its reliance upon the Soviet Union for strategically vital chrome ore.

"Legislation similar to mine has been introduced in the House of Representatives by Representative COLLINS of Texas. I hope that the Congress will take prompt action to change the absurd and dangerous position in which the United States now finds itself.

"Mr. President, I send to the desk proposed legislation to accomplish this purpose, and I ask unanimous consent that the text of the bill be printed at this point in the RECORD." 117 Cong. Rec. S 3994-95 (Mar. 29, 1971).

Subsequently, on April 29, 1971, Senator Cannon also stated his understanding that S.1404 would, if enacted, "*exempt chrome ore from the list of materials subject to the Rhodesian embargo* and thus end our dependency upon the Soviet Union for this highly important commodity." 117 Cong. Rec. S 5905 (Apr. 29, 1971).

B. *Senate Hearings*

Hearings on S.1404 were held before the Senate Committee on Foreign Relations on July 7 and 8, 1971. (The report of these hearings, entitled *U.S. Sanctions Against Rhodesia—Chrome, Hearings on S. 1404 Before the Senate Committee on Foreign Relations,* 92d Cong., 1st Sess., is hereafter cited as "*Senate Hearings*").

In these hearings, both opponents and proponents of S.1404 agreed that the major purpose of the proposed legislation was to override the Executive Orders issued under authority of the United Nations Participation Act, which prohibited imports from Rhodesia so as to permit the importation of Rhodesian chrome.

For example, Senator Byrd, supporting the bill, stated that it would "provide that the President could not prohibit imports of a strategic material from a free world country as long as the importation of the same material is permitted

from *a Communist-dominated country.*" [2] *Senate Hearings* at 2, *see also id.* at 7. He specifically recognized that the President had imposed the embargo "under the United Nations Participation Act" and suggested "that the Congress has a right, as I see it, to review his action, and has a right, as I see it, to adopt legislation such as I am suggesting ... [which would] cease our dependence upon the Soviet Union for a metal vital to our national defense." *Id.* at 7-8.

David D. Newsom, Assistant Secretary of State for African Affairs, opposed the legislation, stating:

> "This proposed amendment to the United Nations Participation Act, whatever its intent, *would have the effect of invalidating the existing embargo on chrome ore imports from Southern Rhodesia so long as such imports are not prohibited from the Soviet Union or other Communist countries.*" *Id.* at 14-15.

Having pointed out that the embargo had been imposed by the President "under the United Nations Participation Act of 1945 which provides authority for domestic enforcement of U.N. sanctions" (*Id.* at 12, *see also id.* at 17), Newsom suggested that S.1404 was "contrary to U.S. policy interests" since it would "call into serious question our will to fulfill our international obligations." *Id.* at 15. He also stated, however, that "were the chrome situation indeed critical, we, too, would seek measures of relief." *Id.*

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[2] The Senate Hearings, Senate Debates, Conference Report and House Debate contain numerous statements indicating the understanding of all concerned that the Byrd Amendment would operate to permit the importation of a strategic material from Rhodesia whenever importation of the same material was permitted from "a" or "any" Communist country. In addition to such statements specifically mentioned in the text throughout this discussion, there are additional references throughout the legislative history.

Nowhere did Newsom or any other opposing witness suggest that Congress lacked constitutional power to pass legislation ending U.S. participation in the embargo.

As summed up by Senator McGee, Mr. Newsom's testimony was that "our dependence on the Soviets for chrome is marginal at best"[3] and that certain negotiations between the British government and the Rhodesian government "could be materially affected, perhaps adversely, by precipitous enactment of the proposed legislation . . . ." *Id.* at 20.

The Honorable Charles E. Diggs, Congressman from Michigan, and a plaintiff in this action, also appeared before the Senate Foreign Relations Committee to oppose the bill. He stated his understanding that

> "*The sole effect of this bill would be to end the so-called embargo against importation of chrome from Southern Rhodesia,* and I am appearing today to emphasize that such an objective would not only place us in violation of our international obligations under the Charter of the United Nations but it would be disastrous to our foreign policy interests in black Africa." *Id.* at 77-78.

Other witnesses clearly recognized that the purpose and effect of the bill was to authorize the importation of Rhodesian chrome. *See, e.g.,* testimony of Dean Acheson, E. F.

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[3] On the issue of world supplies of metallurgical chrome, the *Senate Hearings* (at 58, 94) contain several tables showing reserves. None of these tables shows reserves in Cuba. Nowhere in the hearings, debates, or Conference Report was Cuba mentioned as a source of supply. Moreover, Cuban production of chromite is "believed to have completely ceased." Roskill Information Services, Ltd., *Chromium Minerals, Ferro-Chrome, Chromium and Chromium Chemicals: World Survey of Production and Consumption with Special Reference to Future Demand and Prices* 23 (London, Jan. 1972).

Andrews, L. G. Bliss, *Senate Hearings* at 37-40, 86-91, 49-57; *see also* Statement of Senator Brooke, *id.* at 103-04; Statement of Fred C. Kroft, Jr., President, Ferroalloys Division, Union Carbide Corp., *id.* at 107.

Also, with respect to the question of whether S.1404 was intended to end import restrictions if the importation of any strategic and critical material was permitted from "a" or "any" Communist country, Senators Byrd and McGee had the following exchange:

> Senator McGee: " . . . as Senator Byrd said yesterday in his testimony, this bill contemplates reversal of the President's current authority to prohibit imports of chromite from Rhodesia. In effect this legislation would only give that authority to the President if comparable restrictions were placed on like material imported from any Communist-dominated country." *Senate Hearings* at 49.
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> * * *
>
> Senator Byrd: " . . . first, I would like to put in a little different perspective if I may, the Chairman's opening statement. I think he put a slightly different twist on my testimony and on the precise meaning of the legislation I had introduced, unintentionally, I know, but let me read just for the record . . . the Chairman's statement and then put what I consider a more precise meaning on it, if I may."
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> * * *
>
> [Senator McGee's opening statement quoted above was re-read.]
>
> "Now to put it in a more precise context I would phrase it this way: *this legislation simply provides that the President could not prohibit imports of a strategic material from a free world country if importation of the same material is permitted from a Communist dominated country.* The Chairman's statement is not inaccurate at all, but I think it puts a slightly different

twist on the legislation. I know that he would want to have the interpretation put on it that the sponsor of the legislation is putting on it. That is the reason I wanted to read that into the record."

Senator McGee: " . . . It is important that the record show that there was no twist that was intended." *Senate Hearings* at 74-75.

C. *Senate Committee Report*

The Senate Foreign Relations Committee did not report out S.1404. However, on September 7, 1971, the Committee on Armed Services, of which Senator Byrd was a member, reported out its amended version of H.R. 8687, authorizing appropriations for fiscal year 1972 for military procurement. S. Rep. No. 92-359, 92d Cong., 1st Sess. (1971).

As reported, this bill contained in Section 503 language identical to that of S.1404. With respect to this proposal, the Committee Report stated:

"Section 503 would amend the President's powers under the United Nations Participation Act so that he could not prohibit imports of critical and strategic materials from any non-Communist nation as long as the importation of the same materials from Communist dominated nations is not prohibited by law.

"The Amendment would, under present circumstances, have the effect of allowing imports of chrome ore from Rhodesia since imports from Russia, in calendar year 1970, amount of 60% of U.S. needs." S. Rep. No. 92-359, 92d Cong., 1st Sess. 121 (1971).

D. *Senate Floor Action*

On September 10, 1971, Senator Byrd, in anticipation of State Department efforts to eliminate the section, discussed the bill:

"The purpose of that section is to end the dependence of the United States on the Soviet Union for chrome ore, a material vital to the defense of this country."

His remarks make clear that to accomplish this purpose Section 503 was intended to override in part prior Executive Orders implementing U.N. sanctions against Rhodesia. 117 Cong. Rec. S 14102 (Sept. 10, 1971).

On September 29, Congressman Diggs inserted in the Congressional Record a letter which he had sent to the Secretary of State urging opposition to the Byrd Amendment, which, as he described it, "would, by amending Section 5 of the United Nations Participation Act to permit the importation of Rhodesian chrome contrary to U.N. sanctions against Southern Rhodesia, place the United States in violation of its treaty obligations under the U.N. Charter and seriously erode our foreign policy position vis-a-vis Africa." 117 Cong. Rec. E 10235 (Sept. 29, 1971). He also inserted in the Record a "Telegram to the President from the Black Caucus" stating their understanding of the Byrd Amendment in similar terms. *Id.* at E 10235-36. Congressman Diggs also wrote to all Senators, calling their attention "especially to *Section 503 of the bill, which will end the embargo against importation of chrome from Southern Rhodesia,*" attaching a copy of his testimony before the Senate Committee on Foreign Relations on S.1404, and urging support of the Fulbright Amendment (discussed below), which would have empowered the President to override the Byrd Amendment. *Id.* at 10236.

On the Senate floor, Senator McGee on September 23, 1971, offered an amendment which would have struck Section 503 (the Byrd Amendment) from the Military Procurement bill. In arguing for his amendment, Senator McGee stated:

> "*I am sure that most of the Members of this body are aware that the language of section 503 is specifically designed to have the United States unilaterally break the United Nations embargo against Rhodesia and to import chrome ore from that area.* That is really the

substance and thrust contained in the proposal." 117 Cong. Rec. S 14933 (Sept. 23, 1971).

Extended debate followed, which is reported at 117 Cong. Rec. S 14933-46. Summing up the debate, Senator Stennis, Chairman of the Armed Services Committee, said, *inter alia:*

"We do need the ore. We do not have too much in the stockpile. We absolutely ought not to be cut off from virtually all our supply of the ore and have that supply limited.

* * *

"We have this stockpile. The Committee recommended unanimously against letting it go. We are cut off from the supply in this situation." *Id.* at S 14946.

Senator Stennis also alluded to the sharp increase of price in Russian chrome ore and concluded that:

"After all these matters are weighed, we are left with the Soviet nation as the principal source of supply. That is contrary to everything we have been trying to do through the years.

"Mr. President, I hope we can keep this provision in the bill." *Id.*

Senator McGee, in opposition, questioned the need for chromium imports, asserted that the stockpile was "adequate" and "not an issue in this matter," suggested that Section 503 would make the United States "the only nation to formally repudiate a United Nations sanctioned agreement," and urged that the Senate accept the pending amendment to strike the Section. *Id.*

On a roll call vote, Senator McGee's amendment was defeated 46 to 36. *Id.* at S 14947.

The Byrd Amendment was again the subject of Senate debate after Senator Fulbright introduced a further amend-

ment to the Military Procurement bill which would have made Section 503 subject to the President's right to override it if he determined that "the national interest or a treaty obligation of the United States" so required and informed Congress of his determination. 117 Cong. Rec. S 15115 (Sept. 27, 1971). Senator Fulbright, on introducing this amendment, remarked, *inter alia*, that it

> "has an effect similar to the McGee amendment. The McGee amendment struck this provision. [Section 503.] All this does is, in order to change it a bit and also, I hope, to make it more palatable for some of those who would vote against the motion to strike the provision relating to Rhodesia, is to give the President the option to determine whether it is in the national interest or whether a treaty obligation requires him to abide by the embargo which was voted on and approved by the United Nations." *Id.* at S 15116.

Debate on Senator Fulbright's amendment occurred in the Senate on September 30, 1971. *See* 117 Cong. Rec. S 15584-94.

Among the points made on both sides were the dependence on Russia for vital defense material, the extortionate price of Russian chrome, the small government stockpile of chrome ore that could be depleted in a couple of years, the undermining of the British negotiations with Rhodesia and of the United Nations embargo, and the delegation of power by Congress to the President.

In the debate, Senator Allen stated his understanding of Section 503 as providing

> "that the President of the United States *may not prohibit imports of a strategic material from a free world country so long as the importation of the same material is permitted from a Communist dominated country. Chrome is such a material.* Communist Russia and independent Rhodesia are principal suppliers of the material. Accordingly, if section 503 is retained in the

military procurement bill, *the President may not prohibit the importation of chrome from Rhodesia so long as chrome is permitted from Russia or other Communist nations.*" *Id.* at S 15590.

He further argued that

"it seems to me that this issue should be decided on the basis of our national interest—on the basis of the wisdom of becoming dependent upon Communist nations as a source of materials essential to the defense of our Nation.

• • •

"Thus, the issue is joined—ideology, supported by U.N. Security Council sanctions, as opposed to our national security.

"*The section under consideration does not require the United States to scuttle the United Nations embargo against all trade with Rhodesia.* I wish that it did. Instead, the section deals only with importation of strategic materials which we freely purchase from Communist nations. Shall we permit the U.N. Security Council to dictate to this Nation in a manner to affect adversely our national security? Heaven forbid.

"Turning now to the ideological and moralistic arguments, I cannot understand why, if there are no ideological and moral objections to trade with China, Russia, and other Communist nations, there should be such objections to trade with Rhodesia when it is in our national interest to do so." *Id.*

After debate, the Fulbright Amendment was first passed 45-43. *Id.* at S 15594. However, a motion to reconsider was then passed, 39-38. *Id.* at S 15595-96.

Pursuant to the motion to reconsider, Senator Fulbright's Amendment was brought to a vote on October 6, 1971, at which time it was rejected, 44-38. *Id.* at S 15975-76.

One amendment to Section 503 which was adopted was offered by Senator Brock. It delayed the effective date of the bill until January 1, 1972. The purpose of this amendment was to give the British a little extra negotiating time. *Id.* at S 15991.

The Military Procurement Act, H.R. 8687, then passed the Senate on October 6, 1971. *Id.* at S 16003.

E. *House Floor Action*

The House on October 19, 1971, then took up the question of whether it would agree to the Senate revision of its bill. As passed by the Senate, the bill included not only the Byrd Amendment but also the Mansfield Amendment to withdraw all U.S. forces from Indochina within six months.

The motion by Congressman Hebert to send the bill to conference was agreed to without extensive debate. *Id.* at H 9715.

Congressman Arends then moved that the House conferees be instructed not to agree to any portion of the text of the Senate Amendment not germane to the House bill, H.R. 8687. If adopted, this motion would in effect have instructed the House conferees not to agree to either the Mansfield or the Byrd Amendments. *Id.*[4]

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[4] The Legislative Reorganization Act of 1970 extended the House germaneness rule, which requires that amendments to bills be germane to the subject matter of the bill, to limit the authority of House conferees to act on Senate amendments which would, if made in the House, be considered non-germane and subject to a point of order:

> "No amendment of the Senate which would be in violation of the provisions of Clause 7 of Rule XVI, if such amendment had been offered in the House, shall be agreed to by managers on the part of the House unless specific authority to agree to such amendment shall be first given by the House by a separate vote on every such amendment." Pub. L. No. 91-510, § 126 (Oct. 23, 1970).

Although Congressman Arends' motion on its face related to the technical question of germaneness, most of the debate which followed pertained to the merits of the Mansfield or Byrd Amendments. After debate the motion to instruct was defeated by a vote of 215-192. *Id.* at H 9728.

F. *Senate-House Conference Action*

The Senate-House conferees met and approved Section 503 virtually intact, except that in deference to the House germaneness rule, they entitled the Section as an amendment to the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. § 98, a defense-related law, instead of the U.N. Participation Act. The Conference Report on this matter states, in full text:

"CHROME AND THE NATIONAL STOCKPILE

"Section 503 of the Senate amendment contains language designed to remove the embargo on the importation of chrome ore from Rhodesia.

"The language of Section 503, as added by the Senate, would amend the United Nations Participation Act of 1945 (22 U.S.C. 287c(a)) by adding the following new language:

"On or after January 1, 1972, the President may not prohibit or regulate the importation into the United States pursuant to this section of any material determined to be strategic and critical pursuant to section 2 of the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98a), which is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. 1202), for so long as the importation into the United States of material of that kind which is the product of such Communist-

dominated countries or areas is not prohibited by any provision of law.

"Stated very simply, the language provides that the President cannot prohibit imports of a strategic material from a free world country if importation of such material is permitted from a Communist-dominated country.

"The issue involved in the Senate language is whether the United States need for chrome ore, both from an economic and national security standpoint, should be subordinated to the policy position established by the United Nations in its sanctions against Rhodesia.

"The United Nations Security Council, for the first time in the history of the United Nations, on December 16, 1966, imposed mandatory economic sanctions on Rhodesia. The country's primary exports— asbestos, iron ore, *chrome ore*, pig iron, sugar, tobacco, copper, and meat and meat products were placed on the selective sanctions list. The effective date of the sanctions order was January 5, 1967.

"On May 29, 1968, the United Nations Security Council voted to broaden the sanctions by imposing a virtual total embargo on all trade. On March 18, 1970, the Security Council reaffirmed existing sanctions and called on member states to enforce them more strictly.

"The President of the United States, on January 5, 1967, issued an Executive Order, Number 11322, which effectively implemented the economic embargo adopted by the Security Council of the United Nations.

"The United Nations Security Council Sanctions Committee, in a report published in June 1970, reported

that it received *21 complaints, all from the United Kingdom, of violations involving chromite and ferrochrome shipments from Rhodesia to France, Japan, Netherlands, Italy, Spain, West Germany and the United States.* The U.S.S.R. has identified Red China as another customer for Rhodesian material. Mozambique and the Republic of South Africa did not observe the sanctions from the outset and have helped to facilitate the exportation of Rhodesian chrome.

"The principal impact of the economic embargo on imports from Rhodesia is the inability of the United States industry to import chrome ore."

"Chromium is a strategic mineral essential to the production of steel. It is not produced in the United States.

"There are legitimate and important national security considerations involved in evaluating continuation of our current reliance on the Soviet Union for more than 60 percent of our national needs for a strategic and critical material like chrome. *While there is currently a surplus of chrome in the national stockpile of critical materials, the surplus is not large enough to meet U.S. needs for very long and further dissipation of the stockpile would be damaging to the national security.* Furthermore, it would defeat the very purpose of the stockpile if the United States were to rely on the stockpile as a major source of chrome in the future as it has in recent years.

"As the dominant world supplier of chrome, the Russians have driven the price from a presanction level of about $25 per ton up to present levels of $72 per ton. Thus, the present price is 288 percent of the presanction price, according to U.S. Bureau of Mines figures.

"Foreign producers of stainless steel, who may benefit from Rhodesian sanctions (by virtue of a capability

of securing lower cost Rhodesian ore in violation of the sanctions) have increased their penetration of U.S. markets. Imports of specialty steels are at an all-time high—22% of the total domestic market in the first quarter of 1971. For some individual specialty steels, the penetration is even greater; 35 percent of stainless cold rolled sheets, 68 percent of the market for stainless wire rods, and 54 percent for stainless wire. The imports have a direct effect on domestic employment and production in the specialty steel and the ferroalloy industries.

"Discussion of the Senate position on this matter reflected the general consensus that continued observance of the U.N. imposed embargo against the importation of chrome ore from Rhodesia adversely affects the national interests of the United States in that it—

"(a) makes the United States dependent upon the Soviet Union as a major source of a critical defense material,

"(b) places U.S. steel producers in a very unfavorable competitive position in both the domestic and international market,

"(c) contributes directly to unemployment in the U.S. steel industry, and

"(d) substantially increases pressure to reduce the amount of chrome ore maintained in the national stockpile.

"In view of these considerations, the House agreed to accept the Senate provision on this subject. However, consistent with the objectives of the House-Senate conferees on this matter, the Senate conferees agree to accept House language which places this statutory change in the Strategic and Critical Materials

Stockpiling Act (50 U.S.C. 98)." S. Rep. No. 92-447, 92d Cong., 1st Sess. 21-23 (1971).

G. *House Action on Conference Report*

On November 10, 1971, the House considered the Conference Report on H.R. 8687. The questions raised by the House germaneness rule were solved by the adoption of House Resolution 696, which authorized the waiving of all points of order under the germaneness rule and provided that separate votes could be demanded on the Mansfield Amendment, the Byrd Amendment, or the other nongermane amendment, following debate. 117 Cong. Rec. H 10855-59. Congressman Fraser, Chairman of the Subcommittee on International Organizations and Movements of the Foreign Affairs Committee, who had previously chaired the House hearings on H.R. 5445, the House counterpart to the Byrd Amendment, demanded a separate vote on Section 503. *Id.* at H 10859. Mr. Fraser's remarks make clear that he realized that the intent of the bill was to permit the importation of Rhodesian chrome ore. Thus, he stated:

> "Mr. Speaker, let me dispose of certain issues which have been raised along the way. These sanctions are being undertaken by the U.S. government by the President pursuant to international treaty obligations. . . . If we accept this nongermane amendment we will join South Africa and Portugal and be the third country to openly ignore their international treaty obligations.
>
> *"It is abundantly clear that if we pass this provision and begin to import chrome ore from Rhodesia that we will be in violation of international law.*
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> • • •
>
> "There is no shortage of chrome ore. In fact, we have a stockpile that is in excess of our needs, and part of this stockpile is being released for domestic consumption." *Id.* at H 10859-60.

He concluded:

> *"If there should be an international emergency of some kind, of course, then we can change whatever restrictions we have on importations from Rhodesia.* But there is no such emergency. We have an excess in our stockpile so I believe that this House should support the President and the Secretary of State who have asked that we turn this amendment down and stay in compliance with our international obligations." *Id.* at H 10860.

Congressman Collins of Texas, the sponsor of H.R. 5445, spoke in support of Section 503. He stated, *inter alia:*

> "All that this bill does is to set the law straight. This is to do what is lawful. I agree with my colleague that it should be done according to the terms of the law. *It will amend the United Nations act and states that if a Communist country can send goods into the United States that a free country can send goods into the United States." Id.*

Among those opposing the bill was Congressman Dellums, a plaintiff in this case. Indicating his then understanding of the bill, he stated:

> "shortly we will vote upon an amended version of the Byrd Amendment that would end the embargo on Rhodesian chrome. I join with the gentleman from Minnesota and my colleagues of the Congressional Black Caucus in urging the House to defeat this amendment that would put us in violation of our international legal obligations and which can only be interpreted as a victory for the forces of racism and reaction." *Id.*

Further debate centered on the question of the need of the United States for Rhodesian chrome, the price of Rus-

sian chrome, the impact of Rhodesian chrome on the U.S. stainless steel industry, and the need to live up to our obligations to the United Nations.

Following debate, there was a roll call vote on the question whether the House should agree to the language contained in Section 503 of the Conference Report. Section 503 was approved, 251-100. *Id.* at H 10865.

In addition to Congressman Dellums, most of the Congressional plaintiffs herein voted against Section 503. However, plaintiffs Diggs, Conyers and Hawkins were reported as "not voting." *Id.*

H. *Senate Action on Conference Report*

The Senate considered the Conference Report on November 11, 1971. In the only statement made with respect to Section 503, Senator Javits said:

> "Mr. President, I shall vote to reject the conference report on the military procurement authorization bill, and I urge my colleagues to do likewise. I believe that the amendment which has the effect of forcing the President to violate the United Nations sanctions against Rhodesia, sanctions which the United States voted for in the Security Council, is most unwise and constitutes contempt for international law. I feel very strongly that this is a matter of basic principle of international law and the posture of the United States with respect to the United Nations and the traditional U.S. role of world leadership in support of world law and in support of the United Nations." *Id.* at S 18297.

The Senate then agreed to the Conference Report by a vote of 65-19. *Id.* at S 18298.

* * *

The President then signed the bill on November 17, 1971, and, by its terms, the Byrd Amendment became law on January 1, 1972.

As enacted, the Byrd Amendment reads:

> "SEC. 10. Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. 1202), for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law." Pub. L. No. 92-156, § 503.

ADDENDUM B

AFFIDAVIT OF STANLEY L. SOMMERFIELD
filed April 27, 1972

UNITED STATES DISTRICT COURT
for the District of Columbia

Charles Coles Diggs, Member of the House of Representatives, et al Plaintiffs, v. John B. Connally, Secretary of the Treasury Department, et al Defendants.	Civil Action 773-72

AFFIDAVIT

Stanley L. Sommerfield, being duly sworn, deposes and says:

1. I am the Acting Director of the Office of Foreign Assets Control, United States Department of the Treasury.

2. In my official capacity I was informed by my superiors of instructions sent by the President to the Secretary of the Treasury directing the Treasury Department to take the necessary action to permit the importation of strategic and critical materials of Rhodesian origin, as called for by the Byrd Amendment.

3. I was directed by my superiors to take the necessary action. I did so by issuing an amendment to the Treasury's Rhodesian Sanctions Regulations (31 CFR 530.518) and by

causing said amendments to be published in the Federal Register (F.R. Doc. 72-1199).

/s/ STANLEY L. SOMMERFIELD
Stanley L. Sommerfield

Acting Director
Office of Foreign Assets Control

Subscribed and sworn to before me
this 27th day of April 1972

/s/ YVONNE B. JESSICK
Notary Public

My commission expires 10/14/74

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1037

CHARLES COLES DIGGS, ET AL., PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners commenced the present suit in the United States District Court for the District of Columbia, challenging as "null and void" the so-called Byrd Amendment[1] to the extent it authorized the importation of "strategic and critical" materials from Southern Rhodesia, and seeking to enjoin the importation from that country of such materials, including metallurgical chromite, into the United States.[2] The district court dismissed the suit on

[1]Section 503 of the Military Procurement Act of 1971, 85 Stat. 427. The text of the Byrd Amendment is set out on p. 3, *infra*.

[2]The complaint also asked for an order requiring the federal government to impound all Rhodesian metallurgical chromite already imported into this country by private parties pursuant to the Byrd Amendment.

grounds that petitioners lacked standing and that the complaint failed to state a claim upon which relief could be granted (Pet. App. Exh. A, pp. 34a-46a). The court of appeals, although disagreeing in part on the standing question, affirmed, holding the claim non-justiciable (Pet. App. Exh. B, pp. 47a-55a).

The essential facts are not disputed. Southern Rhodesia declared its independence from Great Britain in 1965. Thereafter, in December 1966, the Security Council of the United Nations, with the affirmative vote of the United States, adopted Resolution 232 declaring "that the present situation in Southern Rhodesia constitutes a threat to international peace and security * * *" and directing all member states to impose an embargo on trade with that country. In 1968, the Security Council reaffirmed its position in Resolution 253, calling for additional economic sanctions against the government of Southern Rhodesia. The President of the United States, acting under the United Nations Participation Act of 1945, as amended, 22 U.S.C. 287c, issued two Executive Orders, Nos. 11322 (3 C.F.R. (1967 ed.) 243) and 11419 (3 C.F.R. (1968 ed.) 125), implementing the embargo in this country.[3]

As a result of this action, the United States had to rely on the Soviet Union, rather than Southern Rhodesia, as its principal supplier of metallurgical chromite, a material not produced in the United States. In 1971,

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[3]Primary responsibility for enforcing the embargo was delegated to the Treasury Department; it issued regulations forbidding the importation of Rhodesian materials without a license. 31 C.F.R. (1968 ed.) 525, *et seq.* These regulations were replaced in 1968 by 31 C.F.R. (1969 ed.) 530, *et seq.* Following the Byrd Amendment, the licensing provisions were revised to permit the importation of "strategic and critical" materials. 31 C.F.R. 530.518, 37 Fed. Reg. 1108.

Senator Harry F. Byrd, Jr., introduced legislation which, in his words (117 Cong. Rec. 8344), was " * * * aimed at ending the dependence of the United State upon the Soviet Union for its supply of chrome ore * * * [by providing that] the President could not ban imports of a strategic material from a free world country if the importation of the same material is permitted from a Communist-dominated country."

The Byrd bill was hotly contested in both the House and the Senate.[4] It was finally adopted by Congress as an amendment to the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98-98h), and was signed by the President on November 17, 1971. As enacted, the Byrd Amendment provides in relevant part:

> Sec. 10. Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area * * *, for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law.

As a result of this legislation, the President directed that the Treasury Department "take the necessary action to permit the importation of strategic and critical materials of Rhodesian origin, as called for by the Byrd Amend-

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[4]See the discussion of the legislative history of the Byrd Amendment set forth in Appendix A (pp. 1a-22a) to the Brief in Opposition of respondent Union Carbide ("U.C. Br. in Opp.").

ment" (see U.C. Br. in Opp., App. B, p. 23a). On January 24, 1972, the Rhodesian Sanctions Regulations were amended to permit issuance of a "General License" for the importation of strategic and critical materials, including metallurgical chromite, from Southern Rhodesia. Such a license was thereafter granted to respondent Union Carbide and to Foote Mineral Company for the importation of chromite, and both companies imported a quantity of this material into the United States. On April 19, 1972, petitioners commenced the present action.

In this Court, as below, petitioners have narrowed the focus of their attack to the regulations promulgated by the President to implement the Byrd Amendment. Their contention is essentially that the Amendment should be construed in a manner that would not authorize the President to devise licensing regulations with respect to the importation of "strategic and critical" materials from Southern Rhodesia. This argument was fully considered and rejected by the court below. The legislative history of the Byrd Amendment (U.C. Br. in Opp. 1a-22a) makes it abundantly clear that Congress intended by this legislation to "end the embargo against importation of chrome from Southern Rhodesia" (*id.* at 10a).

That the President implemented that unambiguous congressional directive through a "General License" regulation, rather than through one of the alternative approaches urged by petitioners (see footnote at Pet. 19), was a legitimate exercise of his constitutional responsibility to execute the power vested in him by the Byrd Amendment. For the reasons stated in the thorough opinion of the court of appeals, on which we essentially

rely here,[5] we agree with the conclusion below (Pet. App. 54a) that "[t]o attempt to decide whether the President chose properly among the * * * alternatives confronting him 'would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly [the courts] do not possess.' *Frothingham* v. *Mellon*, 262 U.S. 447, 489 * * *." And see *Powell* v. *McCormack*, 395 U.S. 486, 518-519.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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[5] While we disagree with the court of appeals' disposition of the standing question (Pet. App. 49a-52a), and agree with the district court on this point (Pet. App. 38a-44a), there is no need for the Court to consider whether these petitioners have standing, if it agrees that the decision below is correct on the issue of justiciability. In neither event is there a case or controversy within the Constitution's grant of the judicial Power.